Supreme Court, U.S.
FILED

961211 JAN 27 1997

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN, *Petitioner,*

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES MCLELLAN; THOMAS HILGENDORF, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

TERRENCE J. MIGLIO*
(Counsel of Record)
PATRICIA B. KENNY
KARIN M. YOUNG
KELLER, THOMA, SCHWARZE, SCHWARZE, DUBAY & KATZ, P.C.
440 E. Congress, 5th Floor
Detroit, MI 48226
Attorneys for Petitioner

DIANE M. SOUBLY
VERCRUYSSE METZ & MURRAY
31780 Telegraph Road, Suite 200
Bingham Farms, MI 48025
Co-Counsel for Petitioner

WILLIAM H. CRAWFORD, II
Chief Legal Officer
CITY OF FLINT
1101 South Saginaw
Flint, MI 48502
Co-Counsel for Petitioner

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

39 pp

ISSUES PRESENTED

1. Whether a municipality can, consistent with the Fourteenth Amendment, adopt a voluntary affirmative action program where there had been prior judicial findings of race discrimination, unsuccessful efforts to remedy the discrimination through alternative means, and where the municipality has conducted hearings and made findings that the effects of prior racial discrimination would continue absent the adoption of an affirmative action plan.

2. Whether in reviewing the City of Flint's Affirmative Action Plan, the United States Court of Appeals for the Sixth Circuit, improperly applied a strict scrutiny standard at a heightened level which was fatal in fact.

3. Whether the United States Court of Appeals for the Sixth Circuit improperly shifted the burden of proof to the City to prove that its affirmative action plan was constitutional even after the City established a strong basis in evidence justifying the adoption of the Plan.

4. Whether the United States Court of Appeals for the Sixth Circuit erred in determining that the relevant statistical pool for sergeants was the population of entry level police officers, even though prior discrimination had adversely affected the number of minorities at the rank of police officer.

5. Whether, the United States Court of Appeals for the Sixth Circuit erred in holding that a gross statistical disparity in the relevant statistical pool could not justify the adoption of affirmative action plan.

6. Whether in reviewing a district court's grant of summary judgment in favor of the City of Flint, the United States Court of Appeals for the Sixth Circuit could disregard the standard of review and effectively grant summary judgment in favor of the

Plaintiffs in the absence of any cross motion or request for such relief.

7. Whether it was manifestly unjust for the United States Court of Appeals for the Sixth Circuit to retroactively apply a heightened level of strict scrutiny to an affirmative action plan that was adopted consistent with precedent which was controlling at the time of adoption.

8. Whether it was manifestly unjust for the United States Court of Appeals for the Sixth Circuit to expose the city to potential retrospective relief by its retroactive misapplication of a impermissibly heightened standard of scrutiny to an affirmative action plan modelled upon a plan approved by the Sixth Circuit immediately before its adoption and recently terminated by the Sixth Circuit without invalidation of the Plan.

LIST OF PARTIES

The City of Flint was a Defendant in the United States District Court for the Eastern District of Michigan and Appellee before the United States Court of Appeals for the Sixth Circuit. The City of Flint is a municipal corporation organized under the laws of the State of Michigan and has no parent or subsidiary corporations.

The Flint Police Officers Association was added as a necessary Defendant in the United States District Court for the Eastern District of Michigan because the outcome of the action could affect contractual rights between the City and the Flint Police Officers Association.

The following were Plaintiffs in the United States District Court for the Eastern District of Michigan and Appellants before the United States Court of Appeals for the Sixth Circuit: Charles Middleton; W. Osmund Kelly, III; Brian Sepanak; Bruce Sepanak; Stephen Hill; Gregory Doerr; Barry Saunders; Robert Lorey; Maynard Newman; James McLellan; and Thomas Hilgendorf. In addition, Mark Campbell, who was a Plaintiff in the United States District Court for the Eastern District of Michigan, dismissed his claims by Stipulation on June 7, 1991.

TABLE OF CONTENTS

	Page
ISSUES PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	3
REASONS FOR GRANTING THE WRIT	7
I. THE SIXTH CIRCUIT'S APPLICATION OF THE STRICT SCRUTINY STANDARD WAS FATAL IN FACT	7
II. THE SIXTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY TO PROVE THAT ITS AFFIRMATIVE ACTION PLAN WAS CONSTITUTIONAL	11
III. THE SIXTH CIRCUIT COMPLETELY DEPARTED FROM SUPREME COURT PRECEDENT IN REJECTING THE CITY'S STATISTICAL EVIDENCE	13
A. The Sixth Circuit Ignored *Paradise*	13

B. The Sixth Circuit Erroneously Concluded That The City's Statistics Were Based Upon The General Population 15

C. The Sixth Circuit Misinterpreted *Croson* By Concluding That A Gross Statistical Disparity Can Never Sustain An Affirmative Action Plan 16

IV. THE SIXTH CIRCUIT FAILED TO CONFINE ITS REVIEW TO THE DISTRICT COURT'S FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT 18

V. THE SIXTH CIRCUIT'S UNJUST RETROACTIVE APPLICATION OF IMPROPERLY HEIGHTENED STRICT SCRUTINY SHOULD BE REVERSED AND/OR THE DECISION'S REACH SHOULD BE MODIFIED 22

A. Standard At Adoption Of Affirmative Action Plan 22

B. Precedent After Plan Adoption But Before *Croson* 24

C. The Post-*Croson* Standard 25

D. The Unjust Retroactive Application of Heightened Scrutiny Should Be Vacated Or Its Reach Modified .. 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) 7, 8, 26

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) 12, 20

Alfaro, et. al. v. Suber, et al., Civil Action no. 613, May 18, 1997 (E.D. Mich. 1997) ..... 5, 9, App. 187a

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 18, 19

Barcume, et. al. v. City of Flint, no. 84-8066 (E.D. Mich. 1986) 6

Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993) ... 21

Bratton v. City of Detroit, 704 F.2d 878, *modified* 712 F.2d 222 (6th Cir. 1983), *cert. den.* 464 U.S. 1040 (1984) 6, 23, 24

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 28

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*

Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994), *reh. den., cert. den.,* U.S. ; 115 S. Ct. 1315 (1995) 12, 20

DPOA v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. den.* 452 U.S. 938 (1981) 6, 23

DPOA v. Young, 989 F.2d 225 (6th Cir. 1993), *on remand* 850 F. Supp. 27 (E.D. Mich. 1994) 27

TABLE OF AUTHORITIES — Continued

Page

Flint Police Patrolmen's Association (FPPA) v. City of Flint, (Genesee County), no. 74-33234-CL ... 4, App. 181a

Forehand v. Florida State Hosp. at Chattahoochee, 89 F.2d 1562 (11th Cir. 1996) 14

Fullilove v. Klutznick, 448 U.S. 448 (1980) 10, 23

Harper v. Virginia Dept. of Taxation, 113 S. Ct. 2510 (1993) 27, 28, 29

Hazelwood School District v. United States, 433 U.S. 299 (1977) 17

Holliman v. Price, 9 FEP Cases (BNA) 1363 (1973) 5, 9

James B. Beam Distilling Co. v. Georgia, 110 S. Ct. 2323 (1990) 28

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) 12, 13, 15, 24

Local 93, Int'l Assoc. of Firefighter v. Cleveland, 478 U.S. 502 (1986) 25

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 18

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990)..... 26

Middleton, et. al. v. City of Flint, et. al., 810 F. Supp. 874 (E.D. Mich. 1993) ..... 1, 16, 18, App. 39a

Middleton, et. al. v. City of Flint, et. al., 92 F.3d 396 (6th Cir. 1996) ..... *passim,* App. 1a

Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) 10, 19

TABLE OF AUTHORITIES — Continued

Page

Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995) 28

Ryder v U.S., 115 S. Ct. 2031 (1995) 28

Steelworkers v. Weber, 443 U.S. 193 (1979) 15, 22

Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), *cert. den.* 504 U.S. 913 (1992) 12, 14, 17

Teamsters v. United States, 431 U.S. 324 (1977) 15

US v. Virginia, 116 S. Ct. 2264 (1996) 7

United States v. Paradise, 480 U.S. 149 (1987) 8, 9, 10, 11, 14, 24

University of California Regents v. Bakke, 438 U.S. 265 (1978) 23

Waldron v. Flint Police Patrolmen's Association, no. 75-40084 (E.D. Mich. 1980) ..... 5, App. 167a

Wygant v. Jackson Bd of Educ., 476 U.S. 267, *reh. den.* 488 U.S. 1014 (1986) 9, 10, 13

UNITED STATES CONSTITUTION

Fourteenth Amendment 1

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1981 ..... 1, 2

42 U.S.C. § 1983 ..... 1, 2

M.C.L. § 37.2101 ..... 2, 6

OPINIONS BELOW

Review is sought of the opinion of the Sixth Circuit Court of Appeals, dated August 6, 1996, *Middleton, et. al. v. City of Flint, et. al.*, 92 F.3d 396 (6th Cir. 1996), appearing at App. 1a to App. 38a of the Appendix. The Memorandum Opinion and Order of the District Court, dated January 7, 1993, *Middleton, et. al. v. City of Flint, et. al.*, 810 F. Supp. 874 (E.D. Mich. 1993), appears at App. 39a to App. 57a. The Memorandum and Opinion of the District Court dated July 29, 1992 appears at App. 58a to App. 71a. The Order Denying Defendant-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc, dated October 28, 1996, appears at App. 72a.

JURISDICTION

Petitioner seeks review of the opinion issued by the Sixth Circuit which reversed the District Court's grant of summary judgment in favor of the City and declared the City's Affirmative Action Plan unconstitutional as a matter of law and affirming denial of the City's motion on, *inter alia,* statute of limitations grounds. The Supreme Court has jurisdiction to review this opinion pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1981 and 42 U.S.C. § 1983, appearing at App. 73a, App. 74a and App. 75a, respectively.

STATEMENT OF THE CASE

On May 16, 1990, Plaintiffs, who are white, filed this action challenging the City of Flint's promotions in the Police Department from the rank of police officer to the rank of sergeant under a voluntary Affirmative Action Plan (the Plan) as a violation of

the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.[1]

The City filed two Motions for Summary Judgment, one with respect to the equal protection challenge on May 19, 1992, and one on limitations and other grounds on October 10, 1991. No cross motion or request for summary judgment was ever filed by Plaintiffs. On July 29, 1992, the first motion was denied with respect to the statute of limitations issue. On January 7, 1993, the District Court granted the City's Motion for Summary Judgment finding that there was no genuine issue of material fact as to whether the City had a compelling interest to justify the adoption of the Plan and whether the Plan was narrowly tailored.

Plaintiffs filed a Notice of Appeal with the Sixth Circuit Court of Appeals dated February 2, 1993. The City filed a Cross-Appeal on February 16, 1993. The Sixth Circuit issued its opinion on August 6, 1996, which reversed the District Court's grant of summary judgment. The Sixth Circuit inexplicably went further and declared the Plan unconstitutional as a matter of law. The Court then remanded the case for further proceedings on issues relating to damages. The City filed its Petition for Rehearing on August 20, 1996. This Petition for Writ of Certiorari is timely because it is brought within ninety days of the Sixth Circuit's October 28, 1996 order denying the City's Petition for Rehearing.

---

[1] Two other counts of Plaintiffs' Complaint alleged that the Plan violated 42 U.S.C. §1981 and the Michigan Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101, et. seq. The City's motions to dismiss and for summary judgment were denied with respect to the §1981 claim and granted with respect to the state law claim. The Sixth Circuit did not address the former issue, but affirmed the dismissal of the state law claim.

STATEMENT OF FACTS

The Plan, which provided for 1:1 promotions of police officers to the rank of sergeant, was adopted by the City in late 1984. Beginning in April 1983, the Flint City Council conducted a series of special meetings to investigate the need for affirmative action in the City, including the impact of the sergeants promotional exam on minorities. The City Council directed that a Task Force comprised of representatives of the City and the Flint Police Officers Association (FPOA) be established. Following the Task Force's recommendations in October 1983, negotiations proceeded between the City and the FPOA. These negotiations produced agreement on a proposed Addendum to the parties' collective bargaining agreement which gave the City the right, should the City find it appropriate, to maintain two separate lists made up of minority and non-minority police officers who had passed the promotional examination and to promote on the basis of a ratio not to exceed one eligible minority for every eligible non-minority. App. 76a. In order to minimize the impact on non-minorities, the Addendum also included an increase in the number of sergeant positions and a significant pay increase for officers. App. 231a.

In April 1984, after the Addendum was ratified by both the City Council and members of the FPOA, the Flint Human Relations Commission (HRC) held public hearings on the need for affirmative action within the Flint Police Department. Based on the testimony and reports received, the HRC issued its Report in August 1984.

Throughout the hearings, the HRC was presented with testimony from numerous witnesses regarding racially discriminatory practices within the City's Police Department, including Flint Police Chief Miles White and labor market economist Marc Bendick, Jr., Ph.D. App. 81a and App. 120a. Chief White presented statistical evidence relating to both entry level hiring and promotions of minorities in the Police Department and

testified that while there were increases in the percentage of minorities hired and promoted during the period of active litigation in the 1970's, those percentages were not sustained. With respect to promotions specifically, Chief White testified that no minorities had ever been promoted above the entry level police officer position prior to September 1974. App. 85a. There had been some minorities promoted to sergeant under a 1974 agreement reached in the case of *Flint Police Patrolmen's Association (FPPA) v. City of Flint*, (Genesee County) no. 74-33234-CL. App. 181a. That agreement provided for the promotion of minorities on a 1:4 ratio for a period of five years or until minorities represented 15% of sergeants. *Id.* However, Chief White testified that the 1:4 agreement expired without minorities ever attaining 15% of sergeants. App. 85a. The promotion statistics he offered also showed that of the fifteen promotions to sergeant between 1977 and 1982, none were minorities. He testified that if no remedial action was taken, the next twenty-one promotions to sergeant from the existing list would all be white officers. Chief White also explained that the operational needs of the Department would be furthered by increasing the number of minority officers and sergeants.

City Council President Melvin McCree also testified that the City Council's investigations in 1981 and 1983 showed that there was a dramatic underrepresentation of minorities in all ranks of the Police Department. App. 98a. The testimony of Chief White and Melvin McCree was uncontradicted before the HRC.

Dr. Bendick conducted an in-depth analysis of the Police Department's hiring and promotional practices. Dr. Bendick concluded that the Police Department's personnel practices had discriminated against minorities at both the entry level police officer position and the promotional level of sergeant. App. 120a. Dr. Bendick's conclusion regarding entry level discrimination was based on a comparison of the qualified minority labor pool with the percentage of minority police officers. His conclusion about

promotions was based upon the comparison of the percentage of minority sergeants with the percentage of minorities that would have been on the police force absent discrimination in hiring or promotion. The disparity between the actual percentage of minority sergeants and the expected number of minority sergeants absent prior discrimination in the Police Department was 10.1% vs. 31.1%. Dr. Bendick's testimony was also uncontradicted before the HRC.

The HRC also reviewed judicial findings of race discrimination against the City's Police Department in several prior lawsuits. Most notably, *Alfaro et. al. v. Suber, et. al.,* Civil Action no. 613, May 18, 1977 (E.D. Mich. 1977) (unpublished), was filed in 1973 by minority officers challenging the hiring and promotion practices of the Police Department and the police officers' union. App. 187a. After a bench trial, the District Court in *Alfaro* found compelling evidence of discriminatory hiring practices in the Police Department.[3] Relying on the improvements undertaken by the City in the preceding three and one-half years, the Court declined to impose a hiring quota at that time.

The HRC also examined the case of *Waldron v. Flint Police Patrolmen's Association,* no. 75-40084 (E.D. Mich. 1980) (unpublished). In *Waldron,* the U.S. District Court upheld the agreement reached in *FPPA v. City of Flint* to promote minorities to sergeant on a 1:4 basis against an equal protection challenge by white officers. App. 167a.

Finding that the statistical and anecdotal evidence of discrimination against minorities established a broad pattern of prior discrimination in the Police Department, the HRC concluded that while other efforts should be continued, a promotional ratio

---

[3] The District Court in *Alfaro* reviewed and considered the findings in *Holliman v. Price,* 9 FEP Cases (BNA) 1363, 1372 (1973), and the earlier agreement reached in *FPPA v. City of Flint,* which provided for the promotion of minority officers on a 1:4 basis for a five-year period.

was needed to remedy the effects of past and present discrimination against minorities in a timely fashion. The HRC concluded that such remedial action would not unnecessarily trammel the interests of non-minority police officers.

The Plan was presented to and approved by the Michigan Civil Rights Commission and the collective bargaining agreement was amended to incorporate the Plan.[4]

At the time it adopted the Plan, the City was fully cognizant of the Sixth Circuit's decision upholding an almost identical voluntary 1:1 dual-list promotional affirmative action plan adopted in 1974 by its neighbor the City of Detroit in its police department. *Bratton v. City of Detroit,* 704 F.2d 878, *modified* 712 F.2d 222 (6th Cir. 1983), *cert. den.* 464 U.S. 1040 (1984). In *Bratton,* the Sixth Circuit held that Detroit's affirmative action plan was a valid and permissible remedy for the clearly identifiable past discriminatory practices. As the City was also aware, the Sixth Circuit had approved Detroit's promotion plan for officers to sergeants. *DPOA v. Young,* 608 F.2d 671 (6th Cir. 1979), *cert. den.* 452 U.S. 938 (1981).

While the Plan was adopted in 1984, Plaintiffs did not file their action until May 1990, more than five years later. At that time, the Plan had also withstood an equal protection challenge by female officers in *Barcume, et al. v. City of Flint,* no. 84-8066 (E.D. Mich. 1986) (Opinion and Order of July 15, 1986). The City prevailed on its summary judgment motion in this case in January 1993 and it was not until August 1996 that the Sixth Circuit not only reversed the decision, but invalidated the Plan. Thus, the City was deprived of even the opportunity to meet the

---

[4] Under the Michigan Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101, *et. seq.,* an employer can submit and obtain approval for an affirmative action plan from the Michigan Civil Rights Commission, an agency created by the Michigan Constitution. An employer's actions taken pursuant to an approved plan are immune from liability for claims brought under the Elliott-Larsen Civil Rights Act.

increased level of scrutiny demanded by the Sixth Circuit's review.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE STRICT SCRUTINY STANDARD WAS FATAL IN FACT.

Allowing the Sixth Circuit's decision to stand effectively precludes any municipality from adopting or maintaining a voluntary affirmative action plan to eradicate the effects of prior racial discrimination. The Sixth Circuit's "fatal-in-fact" level of scrutiny is most notably demonstrated by: (1) an insistence that there be a nearly complete exclusion of minorities in order to find a compelling governmental interest; (2) a determination that if prior courts had declined to order a promotional quota none could be justified; and (3) a conclusion that a promotional remedy has a severe impact on third parties as a matter of law. Apparently reflecting the tide of public antagonism toward affirmative action, the Sixth Circuit altered the constitutional standard of review such that no municipality can adopt or maintain a voluntary affirmative action plan to remedy the effects of past, invidious racial discrimination.

The Sixth Circuit's approach stands in stark contrast to this Court's recent admonition in *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2117 (1995):[5]

> Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' *Fullilove, supra,* at 519, 100 S. Ct., at 2795 (Marshall, J., concurring in judgment). **The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality,**

[5] This holding is noted in *US v. Virginia,* 116 S. Ct. 2264, n. 6 (1996) (Ginsberg, J.).

> **and government is not disqualified from acting in response to it.** (emphasis added).

Also see *Id.*, at 2135 (Ginsberg, J. dissenting).[6]

In this case, the City of Flint stepped up to meet its obligation to eradicate the present effects of past racial discrimination in the Police Department. The City was faced with undisputed anecdotal and statistical evidence of racial discrimination in the Police Department, prior judicial findings that artificial barriers to hiring operated to exclude minorities from police ranks, and a history of persistent failure of alternatives aimed at rectifying identifiable discriminatory practices. The City found that, notwithstanding changes made since the first promotion of a black officer in 1974, significant effects of prior discrimination persisted in the Police Department, particularly at the rank of sergeant. As this Court has held, the government "unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise,* 480 U.S. 149, 167 (1987).

In its opinion, the Sixth Circuit employed a higher level of strict scrutiny which no affirmative action plan could withstand, and which this Court has never endorsed. This overly harsh approach is reflected by three fundamental departures from this Court's precedent.

First, the Sixth Circuit ruled that the evidence must show that there continues to be a nearly complete exclusion of minorities in order to justify affirmative action. The Court incorrectly transposed a requirement that the prior discrimination sought to be remedied by the Plan be of the kind of "pervasive, systematic, and obstinate discriminatory conduct" that existed in

---

[6] Justice Kennedy, concurring in *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989), suggested that not only is there authority to act to eradicate the effects of racial discrimination, but "an absolute duty to do so where those wrongs were caused intentionally by the State itself."

the Alabama Department of Public Safety in the case of *United States v. Paradise,* 480 U.S. 149 (1987) (plurality opinion). App. 15a-16a. In *Paradise,* twelve years after the District Court condemned the Department's racially discriminatory policies, there were virtually no blacks in the ranks above corporal and there were no acceptable procedures for the promotional advancement of blacks. *Id.,* at 162-163. Concluding that the "fact pattern in *Paradise* does not prevail in this case," the Sixth Circuit ruled that the evidence of past discrimination in this case was not sufficiently "egregious" to justify Flint's 1:1 promotional plan. App. 15a-16a. While there is significant evidence in this case parallel to that presented in *Paradise* (e.g., total exclusion of minorities from the rank of sergeant until 1974 and severe underrepresentation of minorities in all levels of the Police Department), this Court's decision in *Paradise* in no way required that there be continuing discrimination of the severity present in the Alabama department in order to justify remedial action.

Second, the Sixth Circuit incorrectly concluded that because the district courts in *Holliman* and *Alfaro* did not order a 1:1 promotional remedy, such a plan could not be justified as a necessary remedy in 1984 as a matter of law. Neither this Court nor any other circuit court has held that a prior judicially ordered remedy is a prerequisite to the adoption of a voluntary affirmative action plan. In fact, this Court has specifically held that a judicial finding of discrimination is not a necessary prerequisite to the adoption of an affirmative action plan. *Wygant v. Jackson Bd of Educ.,* 476 U.S. 267, 278, *reh. den.* 488 U.S. 1014 (1986) (plurality).

In rejecting the promotional remedy adopted by the City, the Sixth Circuit emphasized the alternative steps initiated after the *Holliman and Alfaro* decisions.[7] However, the Sixth Circuit

[7] The Sixth Circuit characterized the "invitation" to the federal courts to order hiring and promotional quotas as something ongoing over a twenty-year

disregarded the fact that less drastic alternative steps and the prior promotional plan failed to eradicate the effects of the City's own past discrimination.[8] The uncontroverted evidence was that the alternative steps fell far short of remedying the effects of the judicially-recognized race discrimination. Contrary to the Sixth Circuit's reasoning, this Court has held that, having undertaken less drastic and racially-neutral alternatives, the City was not required to exhaust all possible remedies before undertaking affirmative action. *Croson,* 488 U.S. at 507. Also see *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1557 (11th Cir. 1994).

Third, the Sixth Circuit's conclusion that the impact of the promotional remedy on non-minorities was severe as a matter of law, is inconsistent with this Court's holdings. This conclusion was reached without regard for the evidence that the City sought to reduce the impact on non-minorities by increasing the number of sergeant positions and significantly increasing the compensation to officers. App. 231a. The City continued to promote white officers on a 1:1 basis under the Plan.

The Plurality in *Paradise* noted that this Court has not required that all remedial plans be limited to the least intrusive means. *Paradise*, 480 U.S. at 184. Also see *Fullilove v. Klutznick,* 448 U.S. 448, 484 (1980) ("No constitutional defect necessarily arises from the disappointment of non-minorities asked to share the burden in curing the effects of prior discrimination.") The Court in *Wygant* specifically recognized that:

> . . . in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As

---

period. This is a misstatement of fact, as the federal courts were only so "invited" during the 1970's.

[8] Chief White testified that the 1:4 promotional plan expired without ever having attained the 15% goal. App. 85a. The fact remains that at the time the Plan was adopted, only 10.1% of sergeants and only 19.8% of officers were minorities.

> part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.

Wygant, 476 U.S. at 280-281. In *Wygant* and *Paradise* this Court distinguished the heavy burden imposed by layoff or discharge and the less intrusive burden of denial of a future opportunity, noting that "postponement imposes a lesser burden still." *Paradise*, 480 U.S. at 183. At issue in this case is the less intrusive burden of delay or denial of promotion to sergeant.

For the reasons discussed above, the scrutiny with which the Sixth Circuit examined the Plan in this case was contrary to this Court's decisions and was so strict as to make the standard "fatal in fact" for all affirmative action plans.

II. THE SIXTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY TO PROVE THAT ITS AFFIRMATIVE ACTION PLAN WAS CONSTITUTIONAL.

Consistent with this Court's precedent, the District Court granted summary judgment to the City because the evidence it presented established an unrebutted inference of discrimination sufficient to justify the implementation of the affirmative action plan. The Sixth Circuit, however, improperly shifted the burden to the City to prove that it had a compelling interest, rather than assessing whether the City had established an inference of discrimination.[9] As a result of this flawed analysis, the Plaintiffs were never required to rebut the evidence presented by the City and to prove that the Plan was unconstitutional.

When a race-based affirmative action plan is analyzed even under strict scrutiny, the party defending the plan bears the

---

[9] The Sixth Circuit stated "[w]e hold that the City has not met its heavy burden of proving that a compelling state interest necessitates its racial quota system, nor has it shown that the quota system is narrowly tailored to serve such an interest." App. 2a.

burden of producing evidence that the plan is constitutional. However, the party challenging the plan retains at all times, the burden of proving that the plan is unconstitutional. *Wygant,* 476 U.S. at 277-278.

In *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 626 (1987) (citing to *Wygant),* this Court reaffirmed that the party challenging the affirmative action plan bears the burden of establishing the invalidity of the plan. The Sixth Circuit ignored this analytical framework in the present case.

As *Croson* teaches by majority opinion, if the party defending the plan produces evidence "approaching a *prima facie* case of discrimination," that party has satisfied its burden to establish a "strong basis in evidence" for remedial action. *Croson,* 488 U.S. at 500. In order to establish a *prima facie* case of discrimination, a municipality need only produce enough evidence from which a rational trier of fact could conclude the presence of discrimination. Once a municipality produces evidence upon which an inference of discrimination can reasonably be drawn, it establishes a strong basis in evidence for remedial action which must be rebutted by the plaintiffs with a showing that the evidence could not reasonably be supported by such an inference. See *Croson,* 488 U.S. at 509; *see also, Wygant,* 476 U.S. at 293.[10] If two competing inferences arise, an issue of fact remains and summary judgment is inappropriate (unlike here, where the Sixth Circuit

---

[10] The Sixth Circuit's opinion directly conflicts with decisions of other circuits which have faithfully applied this proper burden of proof. See *Stuart v. Roache,* 951 F.2d 446 (1st Cir. 1991) (Breyer, J.), *cert. den.* 504 U.S. 913 (1992); *Concrete Works of Colorado v. City and County of Denver,* 36 F.3d 1513, 1522 (10th Cir. 1994), *reh. den., cert. den.,* 115 S. Ct. 1315 (1995). In fact, the decision below is even inconsistent with the Sixth Circuit's decision in *Aiken v. City of Memphis,* 37 F.3d 1155 (6th Cir. 1994) (en banc) (the party challenging the plan bears the ultimate burden of proving its unconstitutionality). (The City sent a Supplemental Citation of Authorities to the Sixth Circuit regarding *Aiken* after oral argument and before the decision.)

effectively granted summary judgment to Plaintiffs without the necessity of a cross motion).

Establishing a "strong basis in evidence" does not mean proving actual discrimination.

> . . . a challenge to an affirmative action plan does not automatically impose upon the public employer the burden of convincing the court of its liability for prior unlawful discrimination; nor does it mean that the court must make an actual finding of prior discrimination based on the employer's proof before the employer's affirmative action plan will be upheld.

Johnson 480 U.S. at 1463 (O'Connor, J. concurring). *See also, Wygant*, 476 U.S. at 292 (O'Connor, J. concurring). The Sixth Circuit erred in shifting to the City a "heavy burden" of proving the Plan was constitutional.

III. THE SIXTH CIRCUIT COMPLETELY DEPARTED FROM SUPREME COURT PRECEDENT IN REJECTING THE CITY'S STATISTICAL EVIDENCE.

A. The Sixth Circuit Ignored *Paradise*.

The Sixth Circuit improperly held:

> There is only one population group that is eligible for promotion to the rank of Flint police sergeant. That relevant statistical pool is the population of previously hired Flint police officers.

App. 25a. This Court specifically held in *Paradise* that the pool of previously hired officers was not the relevant statistical pool because "[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions and resulted in a

departmental hierarchy dominated exclusively by nonminorities." *Paradise*, 480 U.S. at 168.[11]

Following *Paradise*, the District Court held that Dr. Bendick's statistical analysis was in complete compliance with Supreme Court precedent:

> Plaintiff's expert suggests that the City's expert chose an incorrect figure by considering the effect of discrimination at the entry level as influencing the discrimination at the promotional level. However, the Supreme Court has specifically determined that the city's approach is proper.

App. at 51a. In conducting his study, Dr. Bendick first used the qualified labor pool to determine how many police officers would have been minority absent discrimination in hiring at the entry level.[12] Next, Dr. Bendick used that figure to determine how many minorities would have been expected to be sergeants absent discrimination at the entry level. Finally, Dr. Bendick compared this figure to the actual number of minority sergeants on the force, at the time the Plan was adopted. Based on this analysis, Dr. Benedick concluded that absent the discriminatory hiring practices, 31.1% of the sergeants would have been minorities while the actual number of minority sergeants on the force only amounted to a mere 10.1%. By disregarding the fact that discrimination at the entry level impacts the promotional level, the Sixth

---

[11] Other Circuits have faithfully followed this Court's holding in *Paradise*. Writing then for the First Circuit, Justice Breyer, stated: "[o]bviously, if few blacks become police officers, few blacks will become sergeants." *Stuart*, 951 F.2d at 452. Also see *Forehand v. Florida State Hosp. At Chattahoochee*, 89 F.3d 1562, 1574 (11th Cir. 1996).

[12] Plaintiffs never disputed that discrimination was present in the City's hiring practices for police officers. In fact, Plaintiffs' expert Harry Frank, Ph.D. admitted in his deposition that he did not even analyze whether the pool of police officers had been affected by past discrimination. App. 214a.

Circuit further illustrates its fatal-in-fact application of strict scrutiny.

B. The Sixth Circuit Erroneously Concluded That The City's Statistics Were Based Upon The General Population.

The Sixth Circuit's holding that the City lacked a compelling interest to implement an affirmative action plan is based upon the erroneous conclusion that Dr. Bendick used the wrong labor pool in his statistical analysis.

This Court has held that in order to determine the adequacy of the statistical evidence presented to justify the implementation of an affirmative action plan, one must first look to the basic qualifications required for the position at issue. These qualifications determine what the relevant statistical pool is for the purpose of comparison to the percentages of minorities selected for the position at issue. *Croson*, 488 U.S. at 501-502.[13]

Dr. Bendick's conclusion as to the number of minorities who would have been hired into the department absent discrimination was based upon those **qualified** to be hired into the department as police officers: that is, persons of the required age, who possessed a high school diploma and who were actively seeking employment.[14] In spite of the fact that Dr. Bendick based his statistical

---

[13] The *Croson* court held that for certain entry level positions or positions requiring minimal training, statistical comparisons using the general population may be probative of a pattern of discrimination. *See also, Johnson*, 480 U.S. at 631-632; *Teamsters v. United States*, 431 U.S. 324 (1977); and *Steelworkers v. Weber*, 443 U.S. 193 (1979). Since the position of a police officer is an entry level position, Dr. Bendick could have relied upon general population statistics.

[14] Dr. Bendick even further limited the qualified labor pool to account for the City's tendency to hire some of its officers from nearby communities where minorities comprise a smaller proportion of the labor force and he modified the projections to reflect the census-taker's tendencies to undercount minorities and for the propensity of minorities to apply for civil service jobs at a higher rate than for jobs in the private sector. App. 122a-124a and 138a-139a.

analysis on the qualified labor pool, the Sixth Circuit throughout its opinion, repeatedly mischaracterized Dr. Bendick's analysis as being based on the "general labor pool," "general workforce" or "regional labor pool." App. 21a, 23a, 38a. In fact, the Sixth Circuit disregarded the District Court's explicit finding on this point:

> Plaintiff's charge that the City's expert and the City relied upon general population statistics in establishing the plan. A review of the HRC report and the city expert's report from 1984 shows this plainly not to be the case. **While the general population figures are mentioned, the key discussion looks to the relevant labor market, exactly what the Supreme Court has instructed is appropriate.**

App. at 51a. Thus, the Sixth Circuit's mischaracterization of Dr. Bendick's statistical pool further reflects its fatally strict review.

C. The Sixth Circuit Misinterpreted *Croson* By Concluding That A Gross Statistical Disparity Can Never Sustain An Affirmative Action Plan.

The Sixth Circuit stated:

> Thus, as implied by the Supreme Court's holdings in *Croson* and *Adarand*, a plan is constitutionally unsupportable when it is driven at bottom, by nothing but the bare assumption that representation of various groups in specific employment categories should be derived from general proportion, even with whatever "adjustments" the experts, litigants, or courts may think appropriate.

App. 25a. The Sixth Circuit's interpretation of *Croson* cannot be reconciled with this Court's unequivocal ruling in that case:

> There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute *prima facie* proof of a pattern and practice of discrimination..."

Croson, 488 U.S. at 501 (citing to *Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977). This Court further held such *prima facie* proof presents a strong basis in evidence to support a finding of a compelling governmental interest. *Id.*, at 503.

In *Croson*, the City of Richmond's statistical evidence did not support a compelling interest because the city was unable to provide any statistical evidence showing a gross disparity between the expected percentage of minority business enterprises (MBE's) in the industry and the actual percentage in the industry. This was due to the fact that the City of Richmond had no way of calculating the relevant statistical pool because the qualifications for being a contractor were so specialized and difficult to assess. *Croson*, 488 U.S. at 502. As a result, the City of Richmond was forced to rely on general population figures which failed to reflect the pool of qualified persons: those possessing the special skills necessary for participation in the construction industry. *Id.* at 502-503.

This Court's grounds for criticizing the statistical evidence offered in *Croson* are not present in this case. The City of Flint, unlike the City of Richmond, was able to determine how many persons in the relevant market were qualified to be a police officer because the qualifications for such a position were specifically defined: persons over the age of eighteen with a high school diploma.[15]

---

[15] The First Circuit, distinguished *Croson* on the same grounds. *Stuart*, 951 F.2d at 450-451.

Dr. Bendick was able to determine that there was a gross disparity between the percentage of minorities in the relevant labor market who were qualified for the position of a police officer and the percentage of minorities that would have been police officers absent discrimination. Using this figure, Dr. Bendick was then able to conclude that 31.1% of the sergeants would have been minority in the absence of discrimination while only 10.1% of sergeants actually were minority. Under *Croson*, this gross statistical disparity between the percentage of expected minority sergeants and the percentage of minorities actually serving as sergeants constitutes evidence of a *prima facie* case of discrimination. Thus, the City produced evidence to support an inference of discrimination.[16]

IV. THE SIXTH CIRCUIT FAILED TO CONFINE ITS REVIEW TO THE DISTRICT COURT'S FINDING THAT THERE WAS NO GENUINE ISSUE OF MATERIAL FACT.

The District Court granted the City's Motion for Summary Judgment, finding that Plaintiffs had failed to offer evidence to create a genuine issue of material fact for trial. On appeal, the Sixth Circuit abandoned the inquiry as to whether there was a genuine issue of material fact for trial and, instead, resolved the issues as a matter of law.

This Court has established that, reviewing the record *de novo*, the question for the court is whether the evidence taken in the light most favorable to the non-moving party raises a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Further, in undertaking this review, the court is not to make credibility

[16] The Sixth Circuit also ignored the District Court's specific finding that "[w]hen combined with the powerful anecdotal accounts of continuing racism in the Department, the statistical evidence provides the 'sufficient basis in evidence' for this Court to find a compelling state interest to adopt the plan." App. 52a.

determinations, weigh the evidence or determine the truth of the matter. *Liberty Lobby*, 477 U.S. at 249, 255. Nor is the plaintiff relieved of his own burden of producing evidence which would support a jury verdict. *Liberty Lobby*, 477 U.S. at 256-257.

Casting aside its role as an appellate court, the Sixth Circuit throughout its opinion raised challenges which were neither brought by Plaintiffs, nor supported by the evidence, in its effort to invalidate the Plan. The Sixth Circuit never even acknowledged the proper standard of review of the District Court's grant of summary judgment.

For example, the Sixth Circuit concluded that Dr. Bendick improperly assumed that minorities are as inclined as non-minorities to seek employment in the Police Department. App. 26a. However, not only did Plaintiffs fail to challenge this assumption, the Sixth Circuit ignored the evidence which would support it. Dr. Bendick's report in fact contained evidence that the percentage of minority applications received when the department had posted openings was 53.1% between 1973 and 1983, which is significantly greater than the proportion he estimated to be the relevant qualified labor pool. This evidence also demonstrated a significant disparity between the number of minority applicants and officers.

The Sixth Circuit also challenged the statistical analysis as being deficient because of the potential effect of the shift in minority population that occurred in the City of Flint and the possible effect of minority turnover rates. App. 26a-27a. However, Plaintiffs never raised this issue, nor is there evidence in the record to support this contention. When the Eleventh Circuit was confronted with similar challenges by the plaintiffs in *Peightal*, the Court held that "mere speculation" regarding the effect of a shift in minority population was insufficient to rebut the defendant's statistical analysis. *Peightal*, 26 F.3d at 1556-1557.

Further, the improper review by the Sixth Circuit is highlighted by its reliance on 1992 statistics to undermine the basis for the City's adoption of the Plan in 1984. In 1992, minorities

constituted 36% of sergeants and 30% of police officers which was, more than seven years after the Plan was adopted. App. 25a.

Other circuits have applied the Supreme Court's approach for reviewing decisions granting summary judgment in cases challenging affirmative action plans as violations of equal protection.[17] For example, the Tenth Circuit held in *Concrete Works of Colorado v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *reh. den., cert. den.*; 115 S. Ct. 1315 (1995):

> Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest in the municipality to enact a race-conscious ordinance, is a question of law. *Associated Gen. Contractors v. New Haven*, 791 F. Supp. 941, 944 (D. Conn. 1992). Underlying that legal conclusion, however, are **factual determinations** about the accuracy and validity of a municipality's evidentiary support for its program.
>
> * * *
>
> In addressing this question [of the evidentiary predicate for the ordinance] we are particularly mindful that this appeal comes to us at the summary judgment stage, where the court's task is not to weigh the evidence, but rather to discern whether the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita*, 475 U.S. at 587; 106 S. Ct. at 1356.

Id., at 1523 (emphasis added). The Court in *Concrete Works* concluded that the "disputes about the accuracy of Denver's data

---

[17] The Sixth Circuit is inconsistent with its own decision in *Aiken*, 37 F.3d 1155, 1167, where the Court concluded that "a genuine issue remains as to whether the promotions were made pursuant to a 'narrowly tailored' remedy," vacated entry of summary judgment for the defendants and remanded the case to the district court "so that it may reexamine its findings on the narrowly tailored issue."

should not be resolved at summary judgment" and remanded the case for trial. *Id.*, at 1529-1531.

Similarly, the Sixth Circuit's reasoning and conclusions are inconsistent with the decision of the Seventh Circuit in *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993) (*en banc*), which reversed the grant of summary judgment in favor of the defendants in a case challenging an affirmative action policy for the promotion of fire fighters. In that case, the Seventh Circuit rejected the arguments and evidence offered by the City of Chicago to justify the racial preferences in promotions and discussed its concern about the promotion of a possibly unqualified minority. The Seventh Circuit **nonetheless** concluded that the issues could not be resolved on summary judgment without a trial to determine whether the discrimination could survive "strict scrutiny." The Court specifically concluded that evidence regarding the promotion of a minority who had not achieved a passing score created a question of fact for remand. *Id.*, at 894.

In contrast with *Billish*, the Sixth Circuit extrapolated from the testimony of one Plaintiff that 10 points had been added to all scores on the 1987 exam, to broadly conclude that the Plan operated to promote unqualified minority officers. This conclusion ignored the District Court's observation that "[t]here has been no suggestion that the minorities appointed to sergeant were not qualified." App. 54a. Based on its unsubstantiated conclusion, the Sixth Circuit struck down the Plan.

Finally, the Sixth Circuit's clear departure from the proper standard of review is evident in the fundamental inconsistency between its conclusion that "deeper analysis" of the statistical evidence is necessary and its conclusion and adjudication that the City did not have a compelling state interest "as a matter of law."[18]

[18] "We hold that, as a matter of law, the district court erred by adopting, **without deeper analysis**, Dr. Bendick's raw statistics . . ." App. 22a; "Therefore, standing alone **without more serious inquiry** along the lines that we have discussed, Dr. Bendick's assumption . . ." App. 28a. (emphasis added).

Thus, the Sixth Circuit failed to conduct a review of the decision to grant the City's motion for summary judgment in accordance with this Court's articulated standard. In addition, even if there were questions presented by the evidence in the record, the Sixth Circuit's extraordinary decision to effectively enter summary judgment in favor of Plaintiffs is in direct conflict with decisions of other Circuits.

V. THE SIXTH CIRCUIT'S UNJUST RETROACTIVE APPLICATION OF IMPROPERLY HEIGHTENED STRICT SCRUTINY SHOULD BE REVERSED AND/OR THE DECISION'S REACH SHOULD BE MODIFIED.

Straining to find the Plan unconstitutional *ab initio*, the Sixth Circuit unjustly retroactively misapplied this Court's recent pronouncements on voluntary affirmative action to pre-*Croson* conduct consonant with the law at the time of the Plan's adoption.

Given the factual and legal context in which the City adopted the Plan, the decision below should be vacated as manifestly unjust, or, in the alternative, its reach should be modified either by this Court or on remand.

A. Standard At Adoption Of Affirmative Action Plan.

In 1983-1984, when the Plan was considered and adopted, this Court's pronouncements on voluntary affirmative action plans were mixed at best. However, the then Sixth Circuit standard for approving such voluntary plans was clear, and the Plan was adopted to conform to Sixth Circuit precedent.

In its sole employment affirmative action case as of 1984, this Court concluded that a collectively-bargained voluntary affirmative action plan **mandating a 1:1 quota** for minority workers admitted to on-the-job training did not violate Title VII of the Civil Rights Act of 1964. *Steelworkers*, 443 U.S. 193.

The only other precedent from this Court at the time of the adoption of the Plan did not involve a public employer's affirmative action plan, but involved a university admission's program,

University of California Regents v. Bakke, 438 U.S. 265 (1978), and a Congressionally-mandated minority set-aside program granting preferences based on explicit classification by race, *Fullilove v. Klutznick*, 448 U.S. 448 (1980). Both were plurality opinions offering little guidance to lower courts. The lead opinion in *Fullilove* approved an affirmative action plan against constitutional challenge "under either 'test' articulated in the several *Bakke* opinions." *Fullilove,* 448 U.S. at 491-492. In his separate concurrence in *Fullilove*, Justice Powell again reaffirmed his analysis from *Bakke* in the minority set-aside context. In their separate opinion concurring only in the judgment, Justices Marshall, Brennan and Blackmun continued to adhere to the constitutional analysis from Justice Marshall's separate opinion in *Bakke*, 448 U.S. at 417, to the effect that benign racial classifications are not *per se* invalid under the Equal Protection Clause. *Fullilove,* 448 U.S. 519.

In *Bratton*, the Sixth Circuit recognized that this Court's standard of scrutiny for voluntary affirmative action plans was less than clear at the time the Plan was adopted. *Bratton*, 704 F.2d at 885, n. 21. Reviewing the Detroit affirmative action plan upon which the Plan was modeled, the *Bratton* court noted that, in *Bakke* "the Justices have told us mainly that they had agreed to disagree," and that this Court's subsequent decision in *Fullilove* had not significantly clarified the Court's stance on public employer affirmative action plans. *Id.* It further found *Fullilove* a "plurality opinion with little precedential value," and inapposite on its facts. *Id,* at 885, n. 25. Nonetheless, the *Bratton* court noted that the type of "strict scrutiny" analysis in Justice Marshall's concurring opinion in *Fullilove* reaffirmed the Sixth Circuit's earlier analysis in *DPOA v. Young, Id*, at 885-86: an affirmative action plan adopted by a governmental employer could withstand constitutional challenge, and therefore, challenge under § 1983, if a significant governmental interest were served, and if the remedial measures adopted to achieve that governmental interest were reasonable. *Bratton*, 704

F.2d at 883, n. 15 and 886-887. *See also, DPOA v. Young*, 608 F.2d at 694-697.

The *Bratton* court also noted that, even if it were to evaluate the Detroit affirmative action plan upon which the Plan was modeled under "some other, stricter standard," *Id,* at 887. n. 32, it would have found the Detroit plan for promoting sergeants constitutional: "As in *Fullilove*, this program is acceptable under any of the 'formulas of analysis articulated in such cases as *Bakke* (citation omitted),' 448 U.S. at 492, 100 S. Ct. at 2781."

Shortly after the *Bratton* decision, the City and the union agreed to the Addendum containing the promotional ratio. In 1984, the City Council adopted the Plan after public hearings reviewing, *inter alia,* the labor economist's analysis of minority underrepresentation at all levels of the police department, the Flint Equal Employment Opportunity Officer's testimony urging a more accelerated 65/35 promotional ratio than was adopted, and the City Attorney's view that a 1:1 promotional ratio had been approved by the courts. App. 94a and 98a.

Thus, in light of the absence of any clear direction from this Court at the time, the Flint Plan was adopted to conform to clear Sixth Circuit precedent approving the Detroit plan.

B. Precedent After Plan Adoption But Before *Croson*.

In the years following *Croson*, this Court again approved various affirmative action plans but under varying analytical schemes, some suggesting that Title VII, § 1983, and constitutional analyses were, at base, the same. *See, Johnson,* 480 U.S. 616 (plan approved and unilaterally adopted by county to correct past discrimination against women, with Justice O'Connor concurring separately and expressing view that *Weber* and *Wygant* in essence imposed same test for voluntary affirmative action under either Title VII or Equal Protection Clause); *Paradise,* 480 U.S. 149 (1:1 promotional ratio to higher levels of public employment approved premised on a statistical analysis using a qualified minority regional labor pool for

entry level); *Local 93, Int'l Assoc. of Firefighter v. Cleveland,* 478 U.S. 502 (1986) (plan also approved providing for fixed number of promotions and certain promotion goals negotiated into consent decree without ratification by union).

C. The Post-*Croson* Standard.

Five years after the Plan was adopted, this Court invalidated a factually inapposite minority set-aside case of where a city council dominated by African-Americans had relied on generalized assertions of past discrimination in a skilled craft industry.

In *Croson,* it was significant to the theme of "racial politics" in Justice O'Connor's lead opinion that a city council controlled by an African-American majority (**unlike** the Flint City Council) adopted a 30% minority set-aside plan without any findings of identifiable discrimination, and without an appropriate measure of the qualified minority applicant pool. This Court's majority opinion in *Croson* was extremely narrow: four other justices concurred in Parts I, III-B and IV. Part I essentially summarized the facts and proceedings in the case. Part III-B held that Richmond's reliance on past societal discrimination was insufficient to justify a race-based preferential classification under the standard articulated in *Wygant* and rejected the notion that, for jobs requiring special skills, the qualified minority applicant pool was minority representation in the relevant general population. *Croson,* 488 U.S. at 501-502. In Part IV, the majority found it "almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identifiable discrimination in any way." *Id.,* at 507.[19] The factual predicate for each of those holdings is absent here.

---

[19] In *Croson,* there was no majority for the propositions set forth in Part III-A of Justice O'Connor's opinion, as the panel below apparently mistakenly believed. Those propositions to which no majority subscribed included: (1) that the Equal Protection Clause required a "searching judicial inquiry into the justification for race-based measures" where there has been a fixed percentage (or quota) because "there is no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact

Since *Croson,* this Court again sent mixed signals about the standard of scrutiny to follow for status-based classifications challenged under the Constitution. It articulated an intermediate means scrutiny test (rather than a strict scrutiny test) for a case involving a federal Fifth Amendment challenge to race-conscious affirmative action adopted by the federal government in *Metro Broadcasting, Inc. v. FCC,* 497 U.S. 547 (1990). In doing so, turned its back on *Croson's* explanation that strict scrutiny of governmental racial classifications is essential because the benign nature of classification is not always clear. Five years later, in *Adarand v. Pena,* this Court took yet another tack and reversed *Metro Broadcasting,* reiterating a strict scrutiny standard for affirmative action plans by all governmental actors.

The *Croson* standard should not be retroactively applied to the City's pre-*Croson* Plan to hold a nine-year plan unconstitutional *ab initio,* in light of *Croson's* inapposite facts and this Court's mixed pronouncements before and after *Croson.*

D. The Unjust Retroactive Application Of Heightened Scruinty Should Be Vacated Or Its Reach Modified.

The arbitrary injustice of the Sixth Circuit's *sua sponte* entry of summary judgment against the City, instead of reversing and remanding for trial or for supplemented proofs in light of the changed legal standard, is clearly demonstrated in its inconsistent decision in the case involving the Detroit plan. In *DPOA v. Young,* 989 F.2d 225 (6th Cir. 1993), the Sixth Circuit did not find the Detroit plan unconstitutional *ab initio,* but simply terminated the plan. The Court remanded the case to the district court

---

motivated by illegitimate notions of racial inferiority or simply racial politics," *Croson,* 488 U.S. at 493; (2) that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," *id,* at 494; and (3) that, even under a reading of the Equal Protection Clause as proposed by Justice Marshall such that the level of scrutiny would vary according to the ability of different statuses to pursue their interests in the legislative or political process, "heightened scrutiny" would still be appropriate, *id,* at 495-496.

for "a determination of relief, if any, to which plaintiffs, or their counsel, may be entitled." *Id.*, at 228. On remand, the district court held that no such harm had been demonstrated where the last promotions from dual lists had occurred in 1989, and where there were no promotions under the affirmative action plan between the time of the 1989 and 1993 Circuit decisions. *See DPOA v. Young,* 850 F. Supp. 572 (E.D. Mich. 1994). Similarly, in this case, the last promotions from dual lists occurred later in the same year that the District Court approved the Plan under a proper reading of *Croson.*

Therefore, the more appropriate course is to terminate a plan when it has reached an appropriate goal rather than declaring the plan unconstitutional *ab initio,* particularly where the Plan was adopted in good faith reliance on clear Sixth Circuit precedent and in the absence of any controlling, or even easily discernible or predictable, standards of review in this Court. Such a rule may be adopted by this Court here upon plenary consideration of this case, or, upon remand to the Sixth Circuit for reconsideration in light of the *DPOA* case.

Manifest injustice and inequity also results from the Sixth Circuit's misapplication of a heightened scrutiny, under the guise of applying *Croson,* to conduct permissible under clear Sixth Circuit precedent at the time of the Plan's adoption. The crushing costs to state and local governments of such inequitable retroactivity expressly concerned Justices O'Connor, Kennedy, Rehnquist and White in *Harper v. Virginia Dept. of Taxation,* 113 S. Ct. 2510 (1993). This case presents an appropriate factual vehicle under which this Court may reconsider whether the decision in *Harper* was an unwise tack away from the rule on retroactivity announced in 1971 and followed for over two decades.

Initially, it should be noted that three current Justices disagreed with the *Harper* court's brutal disavowal of the Court's well-settled retroactivity rule (*i.e.,* Justices Kennedy, O'Connor, and Rehnquist). Two of the Justices on this Court have not yet

expressed their views as Justices on the issue of retroactivity (*i.e.*, Justices Breyer and Ginsberg).[20] As Justice O'Connor noted in her dissenting opinion in *Harper,* the majority opinion had simply arrived at a rule of retroactivity which overturned settled precedent (*i.e., Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971)), by tallying six votes disagreeing with selective prospectivity from the six opinions in *James B. Beam Distilling Co. v. Georgia,* 110 S. Ct. 2323 (1990). *Harper,* 113 S. Ct. at 2527. Given the disparate treatment of the City of Flint from the City of Detroit by the Sixth Circuit, and given the City's good faith reliance on clear Sixth Circuit precedent in adopting and maintaining its affirmative action plan after full fact-finding, this case would yield a particularly harsh result under the unwise, unnecessary and extreme rule announced in *Harper.*[21] This case presents an appropriate vehicle for a full revisiting of the principles of retroactivity and a reconsideration of the *Harper* rule.

Furthermore, as Justice O'Connor also noted in her *Harper* dissent, neither *Harper* nor any other case of this Court forecloses from this Court the possibility of pure prospectivity. *Harper,* 113 S.Ct. at 2527. Thus, if this Court affirms the Sixth Circuit's new *per se* rule precluding the use of gross statistical disparities, the new burden of proof analysis adopted below and/or the new heightened scrutiny for 1:1 promotional ratios, then this Court is free to, and should, decline to apply the new rule of law to the parties before it and to any other case where the relevant conduct predates its decision, given the enormous potential exposure in class action lawsuits defended by public employers who had in

---

[20] In *Reynoldsville Casket Co. v. Hyde,* 115 S. Ct. 1745 (1995), these Justices adhere to the view that the Supremacy Clause bars a state from circumventing an adverse ruling retroactively applied by means of a state tolling statute. Nonetheless, Justice Breyer suggests that there may be limits on retroactivity, as applied. *Id.,* at 1751.

[21] In *Ryder v. U.S.,* 115 S. Ct. 2031, 2036-2037 (1995), Justice Rehnquist, writing for a unanimous court, suggests that there may be some vitality to the question of whether grave disruption or inequity militates against retrospective relief.

good faith (as here) followed clear precedent when adopting voluntary affirmative action plans, and who had (as here) obtained approval of plans from civil rights agencies.

Finally, as Justice Kennedy's concurrence and Justice O'Connor's dissent in *Harper* noted (*Id.*, at 2526 and 2536-2538, respectively), the majority reached the issue of retrospective remedy, which the parties never placed in issue; hence, the *Harper* pronouncements on retroactivity of remedy are mere *dicta*. This case presents an appropriate vehicle for the Court to enunciate a rule under which, if an affirmative action plan voluntarily enacted in good faith reliance on existing law subsequently becomes unconstitutional because of a change in the law, then the remedy will be limited in retroactive effect.

Here, the City argued unsuccessfully below that the district court should grant summary judgment on statute of limitations and/or standing grounds, where the plaintiffs had not sued within three years of adoption of the Plan, and where the plaintiffs asserted denials of promotion which did not occur within three years of the filing of plaintiffs' Complaint (*i.e.*, the appropriate statute of limitations for civil rights claims under Michigan law, and therefore, under § 1983). App. 58a (arguments of the City are incorporated here by reference). Although the Sixth Circuit below acknowledged a split in the circuits on the statute of limitations issue, it nonetheless erroneously affirmed denial of summary judgment. App. 10a-11a, n.4.

Moreover, since this Court for a time repudiated the premise for the *Croson* decision in *Metro Broadcast* and only recently in *Adarand* affirmed a model of constitutional analysis for all governmental actors, the remedy in this case should be curtailed to denials of promotion from dual lists (if any) no earlier than the 1995 *Adarand* decision, or at the very least to denials of promotion from dual lists no earlier than the 1989 *Croson* decision. This Court may grant plenary consideration on the issue of whether, under the equities of this case, some limit on retrospective relief

should apply, or may remand to the trial court for reconsideration of any issues necessary to a determination of the retroactive reach of the decision for remedy purposes.

CONCLUSION

For all of the above reasons, this Court should grant this Petition for Certiorari, and/or vacate the decision of the Sixth Circuit, and: (a) reinstate the District Court's decision; or (b) remand to the District Court for reconsideration on a re-opened record of whether, under the changed legal standard, Plaintiffs can prove the Plan unconstitutional and/or at what point in time any retroactive remedy should arise; or (c) remand to the Sixth Circuit in light of the 1993 *DPOA v. Young* decision.

Respectfully submitted,

KELLER, THOMA,
SCHWARZE, SCHWARZE,
DuBAY & KATZ, P.C.
By: Terrence J. Miglio*
**Counsel of Record*
Patricia B. Kenny
Karin M. Young
Attorneys for Petitioner
440 E. Congress, 5th Floor
Detroit, MI 48226
(313) 965-7610

VERCRUYSSE METZ &
MURRAY
By: Diane M. Soubly
Co-Counsel for Petitioner
Ste. 200,
31780 Telegraph Rd.
Bingham Farms, MI 48025
(810) 850-8019

Date:

Supreme Court, U.S.
FILED

961211 JAN 27 1997

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN, *Petitioner,*

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES MCLELLAN; THOMAS HILGENDORF, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

TERRENCE J. MIGLIO*
*(Counsel of Record)
PATRICIA B. KENNY
KARIN M. YOUNG
KELLER, THOMA, SCHWARZE, SCHWARZE, DUBAY & KATZ, P.C.
440 E. Congress, 5th Floor
Detroit, MI 48226
Attorneys for Petitioner

DIANE M. SOUBLY
VERCRUYSSE METZ & MURRAY
31780 Telegraph Road, Suite 200
Bingham Farms, MI 48025
Co-Counsel for Petitioner

WILLIAM H. CRAWFORD, II
Chief Legal Officer
CITY OF FLINT
1101 South Saginaw
Flint, MI 48502
Co-Counsel for Petitioner

BOWNE OF DETROIT
610 W. CONGRESS - DETROIT, MICHIGAN 48226 - (313) 964-1330

INDEX TO APPENDIX

A. Opinion of United States Court of Appeals of the Sixth Circuit 1a

B. Opinion of United States District Court for the Eastern District of Michigan of January 7, 1993 ..... 39a

C. Opinion of United States District Court for the Eastern District of Michigan of July 29, 1992 ..... 58a

D. Opinion Denying Petition for Rehearing and Suggestion for Rehearing En Banc 72a

E. Fourteenth Amendment to the United States Constitution 73a

F. 42 USC §1981 ..... 74a

G. 42 USC §1983 ..... 75a

H. Addendum to the July 1, 1983 to June 30, 1984 Collective Bargaining Agreement 76a

I. Testimony of Miles White, Chief of Police, City of Flint, Michigan before Human Rights Commission 81a

J. A Report of Public Hearings Held on April 4th, 10th and 11th, 1984, Human Rights Commission 94a

K. Minority Hiring and Promotion in the Flint Police Department: A Labor Market Analysis, Marc Bendick, Jr., Ph.D., April 1984 ..... 120a

L. The Representation of Minorities at the Rank of Sergeant in the Flint Police Department: An Updated Labor Market Analysis, Marc Bendick, Jr., Ph.D., February, 1992 ..... 135a

M. Opinion and Recommendation, of March 5, 1980, *Waldron, et al.* v *Flint Police Patrolmen's Association, et al.*, E.D. Mich., C.A. No. 75-40084 ..... 167a

N. Order of December 2, 1974, *Flint Police Patrolmen's Association (FPPA)* v *City of Flint* 181a

O. Opinion and Order of May 18, 1977, *Alfaro, et al.* v *Suber, et al.*, E.D. Mich., C.A. 613 ..... 187a

P. Deposition excerpt of Dr. Frank 214a

Q. Comparison of the Proportions of Black Sergeants and Black Patrol Officers 1980-1989, Harry Frank, Ph.D. 219a

R. Letter regarding Contract Ratification and Summary of Proposed Agreement 231a

S. Deposition excerpt of Maynard Newman 235a

T. Brief in Support of Defendant City of Flint's Motion for Summary Judgement 238a

Appendix A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED
App. 0255P (6th Cir.)
File Name: 96a0255p.06

Nos. 93-1367/1368

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES MCLELLAN; THOMAS HILGENDORF,
Plaintiffs-Appellants, Cross-Appellees,
v.
THE CITY OF FLINT, MICHIGAN,
Defendant-Appellee Cross-Appellant,
THE FLINT POLICE OFFICERS ASSOCIATION,
Defendant.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed August 6, 1996

Before: KRUPANSKY, BOGGS, and SUHRHEINRICH, Circuit Judges.

Appendix A

BOGGS, Circuit Judge. The city of Flint, Michigan, adopted a plan in 1985 requiring that 50% of all police officers who are promoted to the rank of sergeant be members of specified "minority" groups. This action under 42 U.S.C. §§ 1983 and 1981 was brought by white police officers who have been passed over at least once[1] for promotion because the plan required that minorities be promoted ahead of them to maintain the designated numerical balance. The district court granted summary judgment to the city, and the plaintiffs timely appealed. We hold that the city has not met its heavy burden of proving that a compelling state interest necessitates its racial quota system, nor has it shown that the quota system is narrowly tailored to serve such an interest. We reverse the district court's decision and remand the matter for further proceedings consistent with this opinion.

I

A. The 1973 *Holliman v. Price* Decision

For more than twenty years, federal courts in the Eastern District of Michigan have considered charges that the hiring and promotion policies and practices of the Flint police department have been tainted by discrimination. In *Holliman v. Price,* 1973 WL 280 (E.D. Mich. Jan. 3, 1973), minority plaintiffs challenged two elements of the police department's entry-level hiring policies. These requirements were that successful applicants (1) have sixty hours of college credit in the field of police administration or a directly related field, or have equivalent law-enforcement experience; and (2) satisfactorily complete a twenty-nine-item written test. The *Holliman* court, agreeing with the plaintiffs that

[1] Five of the plaintiffs have been passed over twice.

the two challenged requirements were invalid, found that a validation study that the city had conducted "was totally insufficient by any professional standards" because it had been based on too small a sampling population. *Id.* at *8. Consequently, "in view of the well documented, historical underemployment of blacks in Flint's Department of Police," *id.* at *10, the court granted plaintiffs' request for a preliminary injunction that compelled the city to proceed with plans to hire twenty new patrol officers. In addition, it ordered the city to reconsider previously rejected applicants for entry-level police positions, this time without assessing their qualifications based on the invalidated hiring criteria. Despite the relief granted, the court also stated that *"[w]e decline at this time, however, to order any particular quota* in [the] hiring of blacks vis-a-vis whites or other non-black minorities." *Ibid.* (emphasis added).

B. The 1977 *Alfaro v. Suber* Decision

Four years later, in *Alfaro v. Suber,* Civ. Action No. 613 (E.D. Mich. May 18, 1977), minority applicants again challenged the police department's hiring policies and practices. The court found that, prior to 1973, "in the entire history of Flint, a total of only twenty-four Blacks had ever been hired" to serve as police officers. Slip op. at 5. On the other hand, 15 of 29 new hires (52%) during the 1972-73 year were minority members; 2 of 8 new hires the following year were minorities; and 56 of 105 (53%) newly hired officers in 1974-75 were minorities. *Ibid.*

In addition to considering the plaintiffs' suit over the police department's *hiring* policies and practices, the district court also ruled on their challenge to the department's *promotion* policies and practices. The court found that, in 1973, 229 applicants had taken the department's written examination for promotion to sergeant; 87% of the white applicants achieved the passing score

of 70 or higher, and all 7 of the Black applicants passed. Moreover, the two racial groups' average scores had been virtually identical, though the court noted that "the minority sampling was too small to be predictive." Slip op. at 10.

In response to an earlier lawsuit in state court, there had been a stipulation and agreement between the city and the groups representing minority police officers in which the city had committed itself to promoting one minority member to sergeant for every four "non-minority" members that it promoted. It made its promotions by creating two separate promotion-eligible lists, one for minorities and one for non-minorities, each based on a composite score that aggregated the test results and a maximum of fifteen seniority points for up to fifteen years' service on the force. In addition, the city required that promotion-eligible candidates have either four years' prior experience as a Flint police officer, or three years' experience as an officer and one year of college. In 1975, a new promotion test was administered to 180 applicants, and 138 white officers passed. Of the 4 Black officers who took the test, 3 passed. All 3 of the Blacks who passed were promoted, pursuant to the stipulation.

In reviewing the record before it, the *Alfaro* court held that there had been a "gross disparity between employment levels of Black and White persons prior to 1973," providing "compelling evidence that the employment practices in the Police department have had a discriminatory impact." Slip op. at 15. However, the court found insufficient evidence to sustain plaintiffs' claims that the department's minority-recruitment efforts were discriminatory. Similarly, "[t]he 1973 and 1975 sergeants examination [sic] were not shown to have a statistically significant disparity." *Id.* at 17. The court concluded that, although the police department had clearly discriminated in its hiring policies and practices prior to 1973,

> *[s]ince that time, it is also apparent that the City has attempted to remedy many of the practices* which caused the disparate impact and has since increased minority representation in the Police Department. Whether these gains have been the result of court action or pressures from federal funding agencies is not entirely certain.
>
> Because of the general improvement in minority representation in the last three and one-half years, *the Court does not believe that imposition of a quota for hiring is necessary*. However, to assure that improvement continues, the Court will retain jurisdiction of the case for five years.

Id. at 20 (emphasis added). The court also prevented the police department from considering more than five years of seniority in applications for promotion. *Id.* at 18.

C. The 1983 Election and the 1984 HRC Hearings

In 1983, the voters of Flint elected a new city government. Mayor James Sharp ran on a platform that included pledges to implement "affirmative action plans" that would increase the city's minority hiring and promotion efforts.

In 1984, public hearings were conducted by the Flint Human Relations Commission ("HRC"). The HRC took testimony from several witnesses. Richard Dicks, a fourteen-year police veteran who had been an unsuccessful plaintiff in *Alfaro* and who had been named Flint's Deputy Administrator for Public Safety by Mayor Sharp, testified. Flint City Council President Melvin McCree reported the results of the City Council's 1981 and 1983 investigations into police hiring and promotion policies, and he conveyed a Council committee recommendation that the city

adopt a plan for minorities to be 65% of new police officers. Furthermore, the city's new police chief, Miles White, who had been appointed by Mayor Sharp, and other political figures provided anecdotal testimony confirming contentions of past discrimination in police hiring and promotions. However, Chief White also stated at the hearing that the police department had undertaken an expensive effort in the 1960s to recruit at Black colleges across the nation; the effort "failed to produce significant numbers of recruits."

1. Dr. Bendick's Testimony

Important testimony came from Dr. Marc Bendick, a labor-force analyst employed by the city, who reported that minorities comprised 46.3% of Flint's 1980 population and 45% of Flint's general labor force in 1984. After allowing for demographic, age, and education factors, for the tendency of census-takers to undercount minority members, for the city's tendency to employ a certain proportion of its entry-level officers from neighboring communities outside Flint where minority groups are not as populous, and for "the propensity of minorities to apply for civil service jobs at a somewhat higher rate than for jobs in the private business sector," Dr. Bendick determined, in a 1984 report, that minority persons should have comprised 39.6% of Flint's police officers in 1984; however, only 19.1% of the force was actually comprised of minorities at the time. Dr. M. Bendick, Minority Hiring and Promotion in the Flint Police Dept. 2, 7 (Apr. 1984). He noted that most Flint police officers had been hired in 1978 or earlier. *Id.* at 4.

Dr. Bendick also opined that 31.1% of Flint's police sergeants in 1984 should have been minorities, although only 10.8% actually

were.[2] However, in finding that minorities comprised 39.1% of the city's 1968 labor pool, 42.0% of the 1969 pool, and 44.5% of the 1970 pool, Bendick at 6, Dr. Bendick's statistics differed sharply from those of other statisticians. *See, e.g., Statistical Abstract of the United States: 1986* 16 (106th ed. 1985) (reporting that Blacks comprised 28.1% of Flint's 193,000 population in 1970). Ultimately, Dr. Bendick found that *"[t]he appropriate end goal for proportionate minority representation at all ranks in the police department is the 45 percent which minorities constitute of the entry-level labor pool for the department."* Bendick at 8.

2. The HRC Report and the Adoption of the "Flint Plan"

After the hearings, the HRC issued a report in August 1984, buttressing its findings of discrimination in the Flint police department by citing the district court decisions in *Holliman* and *Alfaro*. The HRC report included its "find[ing] that 45% is a

---

[2] Because African-Americans comprise approximately 93% of Flint's "minority" population, which is actually now the *majority* population of 52%, the discussion in this opinion uses the terms "minority members," "Blacks," and "African-Americans" somewhat interchangeably, depending upon context. Similarly, although whites are in the *minority* of Flint's population, the discussion in the opinion uses the convention adopted by the district court and the city, referring to that population as the "non-minority."

Further complicating the matter, we note that section VI-D of the plan, which establishes "individual minority group goals" (allocating Blacks 87% of the "Minority Standard," Hispanics 8%, American Indians/Alaskan Natives 3%, and Asians/Pacific Islanders 2%), states:

> Once any minority group exceeds 5% of its individual minority group goal in a classification and/or EEOC category by department, and if there are other underutilized minority groups eligible for appointment, the persons from the group that exceeds the standard will be excluded from future affirmative treatment for that classification and affected department.

Affirmative Action Plan 16 (July 1985). Thus, some minorities may be transformed into "non-minorities" by their success.

reasonable end-goal for minority representation in each rank of the classified service of the police department," HRC Hearings Report ("HRC") at 5, and its further "find[ing] that implementation of a 1-to-1 promotional ratio until parity is achieved will not unnecessarily trammel the interests of non-minority officers." *Ibid.* The HRC acknowledged that the Flint police department had undertaken prior "initiatives...including improvement in validation of exams; modifications of certification procedure; dissemination of information regarding employment opportunities to protected classes; pre-employment inquiries in compliance with state and federal laws; and in-service training and retraining programs for all personnel." HRC at 13. However, the HRC still emerged with a "find[ing] that the achievement of a 45% minority representation within all ranks in the Flint police department would satisfy the operational efficiencies that are associated with having a police department which more nearly reflects the population that it serves." HRC at 5.

A year after the HRC hearings, in July 1985, the Mayor presented to the Michigan Civil Rights Commission ("the Commission") "the City of Flint's Affirmative Action Plan" (hereinafter "the Flint Plan" or "the plan"), based on the HRC's findings. This plan covered the entire city workforce and declared an intent to "[s]earch for selection procedures that minimize adverse impact on minority [sic], females and handicappers." Plan at 21. The Commission approved the Flint Plan in January 1986, and the collective bargaining agreement between the city and the Flint Police Officers Association was amended to incorporate the plan. Promotions of entry-level police officers to the next rank of sergeant were to be made according to a 1:1 ratio, alternating between minority and non-minority candidates.

As of the early 1990s, the city's minority population is approximately 52%, and Blacks comprise 93% of all minorities in

the city. Thus, Blacks constitute slightly less than 50% of the city's population.[3] At the time that plaintiffs brought their suit, in May 1990, minorities comprised a higher percentage of the city's police sergeants than they did of entry-level officers. The city continued to administer its system of tests and seniority weighting to rank the non-minority applicants for sergeant, in order of their eligibility for the 50% of promotions to sergeant that were designated for them. At the same time, the city began ranking minority applicants separately, using the same criteria, for the 50% of promotions that were reserved for them.

Under this new arrangement, certain non-minority persons, like the plaintiffs, have been denied promotions to sergeant that they would otherwise have received in the absence of separate promotion lists. Therefore, they have not received the increased salaries and benefits that they would presumably have obtained if the Flint Plan had not modified the previous promotion system. Furthermore, they cannot begin accruing the seniority as sergeants that they would need in order to become eligible for future promotions. Plaintiffs therefore brought this action against the city for unlawful race discrimination under 42 U.S.C. §§ 1983 and 1981.

II

The district court considered plaintiffs' arguments that the HRC hearings, which the city used as a basis for implementing its promotion plan, were invalid because witnesses were not cross-examined and the Federal Rules of Evidence were not followed. The court correctly noted that legislative hearings are inherently

---

[3] *The American Almanac: 1992-1993*, at 35 (112th ed.). *See also Middleton v. Flint*, 810 F. Supp. 874, 876 n.2, 878 n.4 (E.D. Mich. 1993) (setting the minority population at 53.2% of the city, and noting a 1980 census finding that Blacks comprise 93% of all Flint minority residents).

political and contribute to the public weal in ways different from evidentiary proceedings conducted by judges. The court also observed that it was not familiar with any legislative body that conducts public hearings governed by court rules. *Middleton v. Flint,* 810 F. Supp. 874, 879 (E. D. Mich. 1993).

Plaintiffs criticized the HRC findings on other grounds as well. Recognizing that the city may have discriminated in the past in *hiring* entry-level minority police officers, they argued that the police department's *promotion* policies and practices prior to the adoption of the Flint Plan were not discriminatory. Since sergeants can only be promoted from within the ranks of lower-level officers, and not directly from the greater municipal labor force, the plaintiffs maintained that a proper analysis of promotion policies should focus on the pace at which minority *police officers* are promoted. Plaintiffs' labor-force expert determined that minorities comprise a higher percentage of police sergeants than of lower-ranking police officers. The plaintiffs thus contended that *promotions* must have been awarded fairly. Therefore, plaintiffs claimed the city's decision to extend its affirmative action plan to *promotions* violates a long line of Supreme Court caselaw rejecting such plans in fields of endeavor not marked by past discrimination.

The district court, however, adopting Dr. Bendick's findings and statistical analysis, upheld the 1:1 ratio for promotions and granted the city's motion for summary judgment on the plaintiff's claims under 42 U.S.C. § 1983 and 1981. The plaintiffs brought this timely appeal from that decision.[4]

---

[4] The plaintiffs also claim that the court erred when it dismissed their state claim under Michigan's Elliott-Larsen Civil Rights Act, noting that the Flint Plan had been approved by the Michigan Civil Rights Commission. Memorandum, July 29, 1992, at 5. The court cited Michigan law, which grants Flint a complete defense to an Elliott-Larsen action when the city shows that it has properly filed its Plan with the Commission and that the Commission has approved it. Mich. Comp. Laws § 37.2210; *Kulek v. City of Mt. Clemens,* 164

III

As a preliminary matter, we note that this appeal is from a plan that a municipality has voluntarily adopted on its own initiative. This, this plan differs from those that are crafted under the direction of a court order, resulting from a judicial factfinding process, as happened in *United States v. Paradise*, 480 U.S. 149 (1987) (plurality opinion). Nor was this plan presented to a court by the participating parties as part of a motion for a judicially approved consent decree, as was the case in *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985),

---

Mich. App. 51, 416 N.W.2d 321 (1987); *Ruppal v. Department of Treasury*, 163 Mich. App. 219, 413 N.W.2d 751 (1987). There is no dispute that the Commission approved the Flint plan, albeit after the plan went into effect, so the district court did not err on this point.

The city brings a cross-appeal, claiming that plaintiffs have no right to bring their underlying action because the three-year limitations statute rendered such claims stale. We affirm the district court's decision, rejecting the city's claim, on the grounds that the statute began to run only after the plaintiffs were denied promotion and thereby received notice of the allegedly discriminatory conduct. We reject the city's argument that the statute began to run on the day that the Flint Plan was enacted. As the district court found:

> Implementation of the AAP [Affirmative Action Plan] did not affect plaintiffs. Unlike the adoption of a seniority system, by which an employee's rights and interests are immediately altered, the adoption of an affirmative action plan for hiring and promotions does not alter an employee's status. The AAP only told plaintiffs that the City would, in the future, use certain criteria for making its employment decisions. Only when they were denied promotion pursuant to the AAP did plaintiffs incur a diminution in employment.

Memorandum Opinion and Order, July 29, 1992, slip op. at 9; *accord Kuemmerlein v. Board of Educ. of Madison Metro. Sch. Dist.*, 894 F.2d 257 (7th Cir. 1990) (accrual date is day that notice of termination is received, not day that law is enacted nor later day of actual termination). Furthermore, we uphold the district court's application of *Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981), holding that a continuing violation occurs each subsequent time an applicant is wrongly subjected to an adverse employment decision.

aff'd sub nom. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). Rather, this plan, much like the one adopted in *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469 (1989), for awarding city contracts to minority business enterprises, has been voluntarily conceived in the course of a local government's political process.

A

In its *Croson* decision, the Court rejected a city's plan to set aside 30% of its construction contracts for "minority business enterprises" (MBEs). The Court noted that the city had not endeavored to show that minorities were actually facing discrimination in the local construction industry. Even though the city's population was 50% Black, and notwithstanding that only 0.67% of the city's prime construction contracts had been awarded to MBEs in recent years, the Court held that the city had to show that the numbers resulted from *discrimination,* not merely that such numbers existed:

> While there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs, this observation, standing alone, cannot justify a rigid racial quota in the awarding of public contracts . . . .
>
> . . . .
>
> . . . There is no doubt that "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination" under Title VII. But it is equally clear that "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who

> possess the necessary qualifications) may have little probative value."

488 U.S. at 499-501 (quotations omitted). Furthermore, the Court saw no logic in some of the expansive features of the Richmond plan:

> There is *absolutely no evidence* of past discrimination against [certain other minorities that had been included in the plan's 30% set-aside category, such as] Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry. . . . It may well be that Richmond never has had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

Id. at 506.

Similarly, three years earlier, the Court struck down a school board's affirmative action plan that extended preferential protection from layoffs to certain minorities, holding that such racially based plans may not be imposed to the disadvantage of non-minority workers in government units when those agencies have not been shown to discriminate.

> Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . [A]s the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (plurality opinion).

By contrast, where specific findings do evidence unequivocal and egregious manifestations of long-standing discrimination, the Court has upheld affirmative action plans and even extremely limited quota plans on a brief, finite basis. For example, under the extraordinary circumstances presented in *Paradise,* the Court upheld a one-time quota, requiring the promotion of eight minority state troopers to the rank of corporal, in order to remedy the unyielding record of bigotry in the Alabama Department of Public Safety ("the Alabama department"). The Court recounted the legal battles, court orders, and consent decrees that had been pursued for four decades in a futile effort to pry open the door for reasonable employment and promotion opportunities for minorities. It related a 1972 finding by the district court that the Alabama department had not merely discriminated against Blacks who sought entry-level positions, but had also not accepted a Black trooper at *any rank during the prior thirty-seven years. Id.* at 168. By 1978, of 232 Alabama state troopers at the rank of corporal or higher, there was *still not one* who was Black. *Id.* at 169. Despite court orders and two consent decrees, the Alabama department had not implemented "acceptable procedures for [the] advancement of black troopers into [their] structure." *Id.* at 163. To make matters worse, "for the purpose of frustrating or delaying full relief to [minorities, the Alabama department] artificially restricted the size of the trooper force and the number of new troopers hired." *Id.* at 156-57. In fact, to keep minority troopers at a minimum, the Alabama department, when compelled to hire minorities, selected individuals who were "*other than the best qualified blacks* from the eligibility rosters," *id.* at 157 (emphasis added), in order to stimulate higher rates of subsequent minority attrition. During the same time period that

the people of Flint were electing Mayor Sharp, the district court, as quoted by the Supreme Court, summed up the very different situation in Alabama:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black*. Of the 25 captains, *there is still not one black*. Of the 35 lieutenants, *there is still not one black*. Of the 65 sergeants, *there is still not one black*. Of the 66 corporals, *only four are black*. Thus, the department *still* operates an upper rank structure ... that totally exclude[s] black persons. Moreover, the department is still without acceptable procedures for advancement of black troopers into this structure, and it does not appear that *any* procedures will be in place within the near future. The preceding scenario is intolerable and must not continue.

Id. at 162-63. Under those extraordinary circumstances of "pervasive, systematic, and obstinate discriminatory conduct," *id.* at 190 n.1 (Stevens, J., concurring), the Court approved an extremely circumscribed 1:1 hiring quota, limited to requiring that eight minority members be promoted in tandem with eight nonminority members to the rank of state trooper corporal. Furthermore, even under those appalling circumstances, the divided Court stated that the quota would not continue to be valid if the Alabama department were to take other less drastic measures to mitigate its ongoing discriminatory practices. Thus, as the district court noted, "the Department had 'the prerogative to end the

promotional quotas at any time, simply by developing acceptable promotion procedures.' " *Id.* at 164. When the Alabama department, in 1984, finally presented to the court an acceptable procedure for promotions to corporal, the court suspended the quota. *Id.* at 165. Thus, the quota was "temporary and extremely limited" and "was used only once at the rank of corporal and may not be utilized at all in the upper ranks." *Id.* at 182; *see also id.* at 188 (stressing that the quota had been used "only on one occasion") (Powell, J., concurring). While the Court observed that the district court's "firsthand experience with the parties" left it "best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands,' " *id.* at 184 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6 (1971)), our review clearly indicates that the fact pattern in *Paradise* does not prevail in this case.

In this appeal, the Flint city government cites the HRC hearings and the early 1970s court battles, along with statistical comparisons of the composition of the city's police sergeants to the general Flint labor force, to argue that the city's 1:1 promotion plan is as justified as the one upheld in *Paradise*. By contrast, the plaintiffs point to a clear turning point in 1973 that was recognized by the district courts in both *Holliman* and *Alfaro*. After 1973, the Flint police department's hiring policies and practices changed dramatically, albeit under the pressure of litigation. Therefore, the *Holliman* and *Alfaro* courts refused to impose quotas, or even to establish formal goals and timetables, that would interfere with the improved hiring and promotion process being developed within the police department.

Plaintiffs also point to the police department's higher percentage of minority police sergeants than of minority entry-level officers as evidence that the promotion policies were not marred by discrimination. It is therefore the plaintiffs' contention that

their city, like the Richmond of *Croson*, has implemented an "affirmative action plan" that can no longer be justified, if indeed it ever could have been.

B

In considering race-based quota[5] plans, or even less drastic variations of "affirmative action,"[6] the courts employ a "strict scrutiny" analysis. *Wygant*, 476 U.S. at 273-74; *United Black*

---

[5] There is a rich literature as to the vital, though subtle, distinction between "goals" and "quotas." *See e.g.*, Richard L. Barnes, *Quotas as Satin-Lined Traps*, 29 New Eng. L. Rev. 865 (1995); Andrew M. Dansicker, *A Sheep in Wolf's Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 Colum. J.L. & Soc. Probs. 1, 34-38 (1991); Deval Patrick; *Confronting the Question of Conscience*, 46 Hastings L.J. 1339, 1344, 1347 (1995); Ronald Walters, *Affirmative Action and the Politics of Concept Appropriation*, 38 How. L.J. 587, 603 (1995). In this case, we use "quota" not as a pejorative, but as a simple recognition of the reality of this particular case. It is the term employed throughout by the district court (810 F. Supp. at 876, 881, 883), and by the Supreme Court in *Paradise*, the firmest support for the defendants' position (480 U.S. at 156 & n.5, 163). *See also Croson*, 488 U.S. at 471, 499, 507.

[6] The term "affirmative action" was first used by President John F. Kennedy in the context of federal contractors' responsibilities to promote equal employment opportunities:

> The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

Exec. Order No. 10,925, pt. III, subpt. A, § 301(1), *reprinted in* 1961 U.S.C.C.A.N. 1274, 1276. We note the transformation of "affirmative action" from a term specifically meaning that a person "will not discriminate ... because of race" in President Kennedy's Executive Order to the situation where,

Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1006 (6th Cir. 1992). "The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant,* 476 U.S. at 273. Under that standard, Flint must prove that it had a compelling state interest when it enacted its plan, and that the plan is narrowly tailored to further that compelling state interest. *Croson,* 488 U.S. at 505-07; *Long v. City of Saginaw,* 911 F.2d 1192, 1195 (6th Cir. 1990). This position was strongly reemphasized by the Supreme Court in *Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2113 (1995). "[W]e hold today that all racial classifications, imposed by whatever ... governmental actor, must be analyzed by a reviewing court under strict scrutiny."

In conducting a strict scrutiny review, we first consider whether the Flint Plan is justified by a "compelling state interest." Thus, we inquire whether the city "had a *strong basis in evidence* for its conclusion that remedial action was necessary." *Wygant,* 476 U.S. at 277 (emphasis added); *Vogel v. City of Cincinnati,* 959 F.2d 594, 601 (6th Cir.), *cert. denied,* 506 U.S. 827 (1992); *Long,* 911 F.2d at 1196. "[T]he purpose of strict scrutiny is to *'smoke out' illegitimate uses of race* by assuring that the legislative body is pursuing a goal important enough to warrant use of *a highly suspect tool.*" Croson, 488 U.S. at 493 (emphasis added). In considering the city's claim that its plan is compelled by a history of past discrimination, the district court was presented with three kinds of evidence; prior judicial findings, anecdotal evidence, and competing statistical analyses that sought to compare minority hiring and promotions with purportedly

---

if used to apply in this case, it means nothing but actions that are taken on account of race.

relevant demographic pools. We review, in turn, each of these three evidentiary presentations.

1

As the record before us makes clear, the federal courts have been invited by litigants for more than twenty years to order hiring and promotion quotas in the Flint police department, and the courts have refused to do so. Those courts were presented with the pre-1973 history, just as the HRC was during its public hearings. Similarly, those courts were offered statistical analyses. They found that discrimination existed before 1973, but they also found that the police department was taking steps to rectify past wrongs. Since the time of *Holliman* and *Alfaro,* minority representation on the police force continued to increase, in some measure because of the litigation that brought the police department's practices under the watchful eyes of the courts. Minority promotions to sergeant increased at an even sharper pace, again in an atmosphere marked by the awareness that the courts were watching, but without the imposition of quotas by the court. Notwithstanding their findings of past discrimination in the years before 1973, those pre-*Croson* courts consistently found a quota on hiring or promotion to be an unnecessarily drastic remedy, in light of the circumstances before them.

In the 1970s, as part of a state court consent decree, the Flint Police Department instituted a temporary 1:4 quota system that was directly aimed at its sergeant-promotion program. *Flint Police Patrolmens [sic] Ass'n v. City of Flint,* No. 74-33234-CL (Genesee County Cir. Ct. Dec. 2, 1974) (unpublished). This system was a temporary plan that expired by its own terms when fifteen percent of the city's sergeants were minority members or, in any event, after five years. Today, that minority percentage has more than doubled. Therefore, the prior judicial findings that repeatedly

and explicitly rejected invitations to impose hiring and promotion quotas weigh heavily against the present Flint Plan.

The district judge in this case observed that the prior court decisions in the 1970s "did not consider . . . the type of statistical analysis for a disparate impact analysis that [Flint] put forward in 1984 or in the case at bar, in which discrimination at the entry level is taken into account in determining the need for affirmative action at the promotion level." *Middleton*, 810 F. Supp. at 880. Nevertheless, the district court concluded that the prior cases "do not constitute sufficient evidence to indicate the need for a 1:1 quota in the hiring of police sergeants." *Ibid.* The factual record before us sustains the district court's finding.

2

Next, the district court observed that "the anecdotal testimony [before the HRC] serves to show a culture on the police force that is discriminatory," *see id.* at 881, and it regarded that material to be "considerable and worthy of weight." *Id.* at 880. Nevertheless, the court once more concluded that such evidence could not, on its own, provide the necessary legal support to justify the quota. *Id.* at 881.

"While anecdotal evidence may suffice to prove *individual* claims of discrimination, rarely, if ever, can such evidence show a *systemic pattern* of discrimination." *O'Donnell Constr. Co. v. District of Columbia,* 963 F.2d 420, 427 (D.C. Cir. 1992) (emphasis added) (quoting *Coral Constr. Co. v. King County,* 941 F.2d 910, 919 (9th Cir. 1991)). "Anecdotal evidence is most useful as a *supplement* to *strong* statistical evidence . . . ." *O'Donnell,* 963 F.2d at 427 (emphasis added). The record before us on appeal supports the district court's finding that the anecdotal evidence did not justify the city's decision to implement a

compulsory ratio for promoting police officers of different groups to sergeant.

3

In upholding the Flint Plan, the district court based its justification on the statistical evidence developed by Dr. Bendick, the city's labor-force analyst. The district court noted that the *Paradise* Court expressed concern over whether a department's promotion procedures can be considered fair if entry-level hiring at that department is marred by discriminatory practices:

> [Defendants] argue that no remedial relief is justified in the promotion context because the intentional discrimination in hiring was without effect in the upper ranks, and because the Department's promotional procedure was not discriminatory. There is no merit in either premise.
>
> Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated *exclusively* by nonminorities.

480 U.S. at 168 (emphasis added). When Flint introduced its plan in 1984, the percentage of police sergeants who were minority-group members was 10.8%. Bendick at 7. According to the city's expert, basing his numbers primarily on the percentage of minority members in the general workforce of Flint,[7] the

[7] As noted above, *supra* at 6, Dr. Bendick made slight modifications to the general labor force numbers. He stated that he adjusted his projections downward to allow for lower average age and level of education of the minority population, and for the city's tendency to hire some of its officers from nearby communities where minorities comprise a smaller proportion of the labor force. He modified the projections upward to account for census-takers' tendencies to undercount minorities, and for "the propensity of minorities to apply for civil

percentage of minority sergeants should have been 31.1% at that time. In the decade since 1984, as the percentage of minorities in the general labor pool increased, so did Bendick's estimation of the proper representation of minority sergeants on the police force. Consequently, in a 1992 update, he ultimately determined that, in light of a general Flint labor pool whose minority composition had grown to 45% by 1984, the percentage of minority sergeants in the Flint police force should have reached 41.5% by 1987. Dr. M. Bendick, Representation of Minorities 8 (Feb. 1992). Although the minority proportion of sergeants reached 36% in 1992, the discrepancy at the time that the city adopted its plan was more pronounced, with minorities comprising 10.8% of the city's sergeants rather than the 31.1% that Dr. Bendick believed should have been in place in 1984. These numbers, when combined with the anecdotal accounts of continuing racism in the Flint police department, persuaded the district court that there was a "sufficient basis in evidence" to find that Flint had a compelling state interest to adopt its plan.

We hold that, as a matter of law, the district court erred by adopting, without deeper analysis, Dr. Bendick's raw statistics concerning the city's general labor pool as the relevant population against which to gauge the City of Flint's police promotion policies and practices. Furthermore, we hold that a disparity between the percentage of a protected class employed in a particular workforce or occupation and the raw percentage of class members in a regional labor pool, standing alone, cannot be "a strong basis in evidence" sufficient to justify hiring or

---

service jobs at a higher rate than for jobs in the private sector." This last factor is quite arbitrary and is therefore especially troubling. Interestingly, he did not discuss whether modifications should be made to account for different attrition rates among groups. *See infra* at 26.

promotion quotas.[8] That is, it is permissible to remedy *discrimination*. It is not permissible to remedy *disparity*, without more.

C

In *Croson*, the Court confronted statistics showing that "minority businesses received 0.67% of prime contracts from the city [of Richmond] while minorities constituted 50% of the city's population." 488 U.S. at 499. The Court acknowledged:

> There is no doubt that "[w]here *gross* statistical disparities can be shown, they alone in a *proper* case *may* constitute prima facie proof of a pattern or practice of discrimination" under Title VII. But it is equally clear that *"[w]hen special qualifications are required* to fill particular jobs, *comparisons to the general population (rather than to the smaller group of individuals who*

[8] Dr. Bendick's numbers also are quite misleading in other ways. For example, he reported in his 1992 labor-market analysis that there was a "minority shortfall" in the "Number of Jan. 1992 Officers [who had been] Hired" in 1974. Eleven "Jan. 1992 Officers" had been hired in 1974; only two were minority members. Similarly, eight "Jan. 1992 Officers" had been hired in 1975; only one was a minority-group member. Such numbers imply that fewer than 16% of the Flint police officers who were hired during 1974-75 were minority members. However, Police Chief Miles White, who testified before the Flint Human Rights Commission in favor of the Flint Plan, reported that 105 police officers had been hired by the Flint police department in 1974-75, and fully 56 of them were "minority hires." These "minority hires" comprised 53.5% of the police officers hired in 1974-75. Police Chief White apparently based his statistics on the findings of the *Alfaro* court. *See Alfaro*, slip op. at 5.

Because we hold that Dr. Bendick's statistical labor-force analysis was incomplete and therefore irrelevant to the question before the district court, we need not decide at this time whether the district court erred by choosing to use the city's general labor force as its relevant population sample, rather than limiting its analysis, as plaintiffs urge, to the population of already-hired Flint police officers, of whom Blacks comprised 17.3% in 1984.

> *possess the necessary qualifications) may have little probative value."*

Id. at 501 (emphasis added) (quoting *Hazelwood Sch. Dist. v. United States,* 433 U.S. 299, 307-08 & n.13). Therefore, the *Croson* Court concluded, "where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities *qualified to undertake the particular task." Croson,* 488 U.S. at 501-02 (emphasis added). Although presented with a gross numerical disparity between the proportion of minorities living in Richmond and the proportion of minority business that had received city construction contracts, the *Croson* Court held that:

> standing alone this evidence is not probative of any discrimination in the local construction industry. There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.

Id. at 503 (citing 1986 Presidential report that "black-owned businesses are more than proportionately represented in the transportation industry, but considerably less than proportionately represented in the wholesale trade, manufacturing, and finance industries"). The Court decried the " 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* at 507.

By way of comparison, we note abundant evidence that persons whose origin is the Indian subcontinent are very heavily represented in the lodging and motel business. Edwin McDowell,

Hospitality Is Their Business, N.Y. Times, Mar. 21, 1996, at D1 (46% of America's economy hotels and 26% of total lodgings owned by Indian-Americans); Greg Johnson, *Column One,* L.A. Times, Apr. 1, 1996, at A-1 (12,500 lodging properties owned by Indian-Americans surnamed Patel). This by a population that represents less than .5% of the United States population. 1996 World Almanac 386. Is this a sign of discrimination, whether in favor of or against this particular group? Hardly. Yet, any such "disproportion" necessarily must create a corresponding disproportion for Indian-Americans in other lines of endeavor. Thus, as implied by the Supreme Court's holdings in *Croson* and *Adarand,* a plan is constitutionally unsupportable when it is driven, at bottom, by nothing but the bare assumption that representation of various groups in specific employment categories should be derived from general proportions, even with whatever "adjustments" the experts, litigants, or courts may think appropriate.

In this case, there is only one population group that is eligible for promotion to the rank of Flint police sergeant. That relevant statistical pool is the population of previously hired Flint police officers. Plaintiffs argue that 30% of those officers in 1992 were minorities, while 36% of the sergeants were minorities at that time, seemingly indicating that the police department's *promotion* policies and practices have been free of discrimination against minorities. However, the city maintains that the entry-level police population has itself been tainted because of past discrimination against minorities seeking to join. Thus, if Dr. Bendick's supposition is correct, there should have been more entry-level minority officers, and consequently more promoted sergeants.

We have carefully reviewed Dr. Bendick's report and deposition testimony, and, while some of his statistics may be described as somewhat useful, we find his interpretive statistics, projections, and analyses to be misleading because they are based on

conclusory assumptions that have no basis in the law. *See supra* at 6-7. While he adjusts his numbers carefully to allow for age and education differentials, for inefficiencies in census-taking, for lower minority presence in the populations outside Flint that have supplied some of the city's officers, and for an assumed "propensity of minorities to apply for civil service jobs at a higher rate than for jobs in the private sector," he assumes without any substantiation whatsoever that minority men and women as a group are exactly as inclined as are non-minority men and women as a group — neither more so nor less so — to seek employment in the police department, and that they are exactly as qualified under non-discriminatory conditions. Thus, he assumes that their 45% presence in the 1984 general labor force should have resulted in their 39.6% presence as police officers and 31.1% as sergeants. Bendick at 7.

This court has observed in the past that statistical comparisons with the general workforce of a city are not reliable indicators of discrimination because such a population sample is too general to constitute a relevant statistical pool. *See Vogel,* 959 F.2d at 600; *Long,* 911 F.2d at 1202. Furthermore, in *Long*, when we were presented a record for review that included statistics showing a limited minority presence in a Michigan city's police force, we noted that "this court should be ever mindful that there could have been and generally were numerous explanations for disparities between the percentage of minority and nonminority police officers on the Saginaw police force, many of them unrelated to discrimination of any kind." *Id.* at 1198-99. We also noted that the City of Saginaw had experienced a significant exodus of white residents during the prior decade. The population shift resulted in minorities comprising a higher percentage of the city's general labor force after 1980 than they had constituted in previous years, when many police officers had been hired. *Id.* at

1200.[9] In addition, "the city ... failed to consider the high noncoercive turnover (voluntary terminations, retirements, illnesses, etc.) rate among minorities (27.5% of the total turnover rate within the Police Department) as compared to the lesser rate among nonminorities that would, within the context of th[e] case, obviously result in significant statistical distortions ... " *Ibid.*

Just as "[t]here is no iron law of human behavior that every racial or ethnic group will perform equally well on nonbiased examinations in all fields of human endeavor," *Billish v. City of Chicago,* 989 F.2d 890, 896 (7th Cir.) (en banc) (quoting *United States v. City of Chicago,* 870 F.2d 1256, 1261 (7th Cir. 1989)), *cert. denied,* 114 S. Ct. 290 (1993), "it is common for different groups to rely on different mobility ladders." Thomas Sowell, *Preferential Policies: An International Perspective* 132 (1990) (quoting Cynthia H. Enloe, *Police, Military and Ethnicity: Foundations of State Power* 143 (1980)). If the Black population of Flint has inclined to rely on police service as an important mobility ladder, then it could well be that even 45% minority representation would be inadequate to withstand subsequent claims by individual Black applicants that they have faced discriminatory barriers to employment or promotion within the department. On the other hand, as seemed to be the case with the construction-related entrepreneurship discussed in *Croson*, it may be that the police department of Flint is not the mobility ladder of choice for the city's minorities. Indeed, during the course of his

---

[9] In a trend comparable to that which we noted in *Long* when discussing the demographics of Saginaw, Flint has experienced significant population shifts in the years since 1970. In that year, Blacks comprised 28.1% of the city's 193,000 population. Ten years later, the city's population had dropped to 160,000, and the Black proportion had risen to 41.43%. Those trends continued into 1990, when the population had fallen to 141,000, while the Black percentage had reached 47.9%. *The American Almanac: 1992-1993* 35 (112th ed. 1992); *Statistical Abstract of the United States: 1986* 16 (106th ed. 1985).

deposition in this case, Thomas Bugbee, who had been City Personnel Director under Mayor Sharp and others, revealed that, for many years during the 1970s and 1980s, "we had a lot of white males coming down [applying for police department positions] who had baccalaureate degrees out of Ferris and Michigan State. And we were not getting college degreed blacks, for example, coming down. Generally, you know, they were recruited heavily for other kinds of positions." Deposition at 36.

Therefore, standing alone without a more serious inquiry along the lines that we have discussed, Dr. Bendick's assumption that the Black population of a race-neutral city police department will virtually mirror the Black population of the general workforce at large is merely conclusory.

Furthermore, as this court has noted previously, evidence of past discrimination that is remote in time will not support a claim of compelling governmental interest when other evidence is adduced to show that the governmental body has taken serious steps in subsequent years to reverse the effects of past discrimination and to implement appropriate new standards. Thus, in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), we held that strong evidence proffered in 1989 that a city fire department had discriminated prior to 1975 "is too remote to support a compelling governmental interest to justify the affirmative action plan," especially in light of evidence that the city had subsequently taken steps to improve its recruitment efforts. *Id.* at 409. Similarly, in our case, as the HRC's 1984 report grudgingly acknowledged, the Flint police department had undertaken "initiatives . . . including improvement in validation of exams; modifications of certification procedure; dissemination of information regarding employment opportunities to protected classes; pre-employment inquiries in compliance with state and federal laws; and in-service training and retraining programs for all personnel." HRC at 13.

D

Even if the city had presented statistics evidencing a compelling state interest in imposing its plan, the plan would need to pass a second measure of strict scrutiny to ensure that it is narrowly tailored to achieve that compelling state interest. In *Paradise,* the Supreme Court identified several factors to consider "[i]n determining whether race-conscious remedies are appropriate [i.e., narrowly tailored]." 480 U.S. at 171. These include: (1) the necessity for the relief; (2) the efficacy of alternative remedies; (3) the flexibility and duration of the relief, including the availability of waiver provisions; (4) the relationship of the numerical goals to the relevant labor market; and (5) the impact of the relief on the rights of third parties. *Ibid.*

This opinion is not intended to deny that racial discrimination and disadvantage exists at many levels of our society and in many ways. Our colleague, Judge Keith, has eloquently stated:

> I know this to be true, because as a black man in these United States, *I face racism daily.* There is not a day that passes when I am not reminded of the color of my skin. . . . Every aspect of American life — even the judicial system —is tainted by racism.

Jim Fitzgerald, *Wrong Questions, Right Answers,* Detroit Free Press, Dec. 28, 1990, at 8-F.

Judge Keith has been further quoted, in a speech by former United States District Judge Robert M. Duncan, as stating, "Every day of my life I am in some fashion personally troubled by racial matters in America. . . ." Judge Duncan went on to say, of himself, that despite "42 years of Bar membership, [I] have yet to feel one day of true equity in America." Cincinnati Bar Ass'n Rep. at 5 (Sept. 1994).

However, even the enduring and reprehensible fact of racism does not justify every type and degree of government action based upon race. Rather, the Supreme Court has laid down, in *Adarand, Croson,* and the other cases set forth above, particular standards as to when and to what extent race may be used by government as a factor to disadvantage some Americans at the expense of others. In resolving the case before us, we are bound to apply those standards.

E

In this case, the district court proceeded to analyze the Flint Plan under each of the factors identified in *Paradise*. First, it found that the plan provided necessary relief, especially in light of the history of discrimination on the police force, as shown through the statistical and anecdotal evidence. Second, the court found that the alternative strategies that had been suggested by the plaintiffs were inadequate and that, in the absence of a quota, under-representation would continue until an entire generation of police sergeants retired. Third, the court found the plan flexible enough to satisfy strict scrutiny. In the court's words:

> There has been no suggestion that the minorities appointed to sergeant are not qualified. This plan is not of indefinite duration. The *Paradise* Court also upheld a plan with a long duration. Judge Gadola, in *Detroit Police Officers Ass'n v. Young,* 765 F.Supp. 393, 396 (E.D. Mich. 1991) upheld a 1:1 Plan with a sixteen year duration as reasonable. This Plan will probably expire this year or next year, eight to nine years after inception.

810 F. Supp. at 882 (citation and footnote omitted).

Fourth, the court, adopting the city's definition of the relevant labor market, found that the plan's 41.5% goal set a proper target, and that *Paradise* "provides authority for the statistical analysis that removes the effect of prior discrimination to determine the relevant qualified pool."

Finally, the district court held that the plan was compatible with the Supreme Court's views on minimizing the adverse impact on third parties:

> The Supreme Court has said that unlike the discharge of workers, the granting of promotions is a less painful way to effect affirmative action. Thus, in the *Paradise* case, the Supreme Court upheld a rigid hiring quota on a police force; whereas, the Court struck down race-based layoffs in *Wygant*, 476 U.S. at 282-83 ("Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."). Thus, the case at bar may be distinguished from *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990), in which the Sixth Circuit struck down Saginaw's decision to lay off police officers to conform to affirmative action goals.

810 F. Supp. at 883.[10]

---

[10] The district court also stated that the city would have to discontinue the plan once its goal of 41.5% minority sergeants is met:

> The City's expert has suggested that "operational needs" and "operational efficiency and effectiveness" would be enhanced by increasing the percentage of minority representation at the sergeant's level until 53.2 percent of the sergeants are minority. This number reflects the Flint minority population.

In reviewing the district court's decision on this appeal, we have already questioned whether the city proved that relief was necessary at any time during the duration of the Flint Plan. Thus, we hold that the first element of the Court's five-step inquiry into "narrow tailoring," the "necessity element," was not met. Neither was the second element, which gauges the efficacy of less drastic, alternate possibilities. For two decades, the district courts have rejected invitations to impose hiring and promotion quotas on Flint's police department, and the evidence of discrimination in the 1970s was more compelling than it is in the 1990s. Nevertheless, the courts, supported by all available statistics, found that the city had taken significant alternative steps since 1973 to ameliorate past wrongs. Even in the egregious case of *Paradise*, where a quota was upheld, the quota merely required the Alabama department to promote eight Black troopers to corporal in tandem with eight such white promotions. 480 U.S. at 172. Even then, the quota was "ephemeral," and it would "evaporate[]" as soon as

---

> This goal is plainly insupportable under current law. Goals other than remediation of prior discrimination of a particularized group cannot serve as the basis for an affirmative action program by a state entity. The City cannot now amend the Plan to choose the general population as the basis for comparison.
>
> Therefore, the City must cease the operation of the Plan as it relates to the hiring or promotion of police sergeants as of the date that minority representation of police sergeants reaches 41.5 percent.
>
> . . . .
>
> The Plan shall cease to operate in connection with the hiring of sergeants on the date that the percentage of police sergeants that are minority reaches 41.5 percent. On that date, a new promotion or hiring policy shall be placed into effect in which sergeants shall be hired on a color-blind basis. After that date, the City may not institute any race-based hiring of sergeants absent the establishment of a new affirmative action plan in accordance with constitutional requirements.

810 F. Supp. at 883-84 (citation omitted).

the Alabama department implemented reasonable alternative promotion procedures without an adverse impact. *Id.* at 178. As the *Paradise* Court observed:

> Thus, the [district] court imposed a 50% promotional quota in the upper ranks, but only *if* there were qualified black candidates, *if* the rank were less than 25% black, and *if* the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank. . . . The court highlighted the temporary nature and flexible design of the relief ordered. . . .

Id. at 163-64.

By contrast, the Flint Plan has lasted for nearly nine years, perhaps more,[11] continuing even after the percentage of minority sergeants in the force was higher than the percentage of minority entry-level officers. The nine-year plan was imposed even though the city was already being successfully prodded, in less drastic, alternate ways, in the years after 1973: prodded partly by the courts, partly by the city's desire to win federal grants, partly by the electorate, partly by the positive role played by pioneering minority officers who worked for change from within, partly by a sincere desire to hire the best officers, and partly by the consciences of those faced with calls to ameliorate the injustices of the past. Complete reform may not have come overnight, but the message of both *Croson* and *Paradise* is that the complete

---

[11] Shortly after oral argument, the city submitted to this court an affidavit that attested to the plan's termination, claiming that its goal had been reached, and asking us to take judicial notice of the fact that the plan was no longer being implemented. However, plaintiffs responded with documentation that suggested that the plan was still being applied in full force, using the guise of a single, racially neutral, unified list of candidates. Upon our remand of this case to the district court, this factual dispute may require resolution.

implementation of such reform is not a prerequisite to avoiding a quota remedy.

Third, in terms of its flexibility and duration, the Flint Plan was not sufficiently flexible to meet the requirements of strict scrutiny. In judging "flexibility," courts often consider whether such a plan provides a waiver in a case when sufficient numbers of *qualified* minorities are not available for hire or promotion. *See, e.g., Local 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 512 (1986); *Vogel,* 959 F.2d at 599. On the surface, the Flint Plan seems to "pay lip service" to this concern, stating that "[t]hese goals are flexible targets; they are not quotas or rigid standards. Furthermore, these goals shall not result in unqualified persons being appointed to positions." However, these words are merely conclusory assertions. The operational terms of the plan are different. In Flint, for a police officer to qualify for promotion to sergeant, an applicant must take an examination and emerge, in conjunction with other factors, with a minimum score of 70. That grade is stated as the dividing line that distinguishes the "qualified" candidate from the "unqualified" candidate. However, Flint has, in fact, created a free-floating passing standard, at one time awarding as many as ten bonus points to *all* test-takers, thereby altering otherwise failing grades as low as 60 into "qualifying" scores. On one list before us in the record, it appears that four of ten "passing" scores of "qualified" minority candidates for sergeant were boosted into the 70s by the 10-point bonus. This inference was confirmed by counsel at oral argument. We also note that an upward alteration of only an additional five points would have turned another six "unqualified" candidates into "qualified" ones. This "flexibility" with *grading* destroys the city's claim that its plan flexibly waives the 1:1 requirement so that it "shall not result in unqualified persons being appointed to positions."

Moreover, as the record before us shows, the Flint Plan was imposed for a duration of nearly nine years and remained in force at least until the strict percentage of 41.5% was reached. Although the district court stated, 810 F. Supp. at 882, that the *Paradise* Court upheld a plan with "a long duration," we can find nothing in the *Paradise* opinion that justifies the district court's undocumented statement. Indeed, the *Paradise* Court specifically noted that the plan was "temporary," 480 U.S. at 163; it was "ephemeral," and it "evaporated" at the ranks of corporal and sergeant upon "implementation of promotion procedures without an adverse impact." *Id.* at 178. Thus, it had been implemented "only on one occasion, when [the district court] ordered the promotion of eight blacks and eight whites to the rank of corporal in February 1984," as a "one-time occurrence." *Id.* at 188 (Powell, J., concurring).

Similarly, in *Local 93,* the Court affirmed this court's opinion upholding a consent decree that created promotional goals. As the parties emphasized in their application to the district court, and as the district judge reemphasized when he granted the request, the parties shortened the life of the proposed decree from nine years to four years. Thus, the court found that "the amended proposal is more reasonable and less burdensome than the nine-year plan that had been proposed originally." 478 U.S. at 512. By contrast, Flint's plan was not flexible; it lasted about a decade, perhaps more, and it has compromised the integrity of its qualification process by boosting previously failing grades of 60-69 into the passing range.

Fourth, as we have noted above, the record does not reflect any relationship between the numerical goal of 41.5% and the relevant labor market. Rather, the city's statistical expert provided a conclusory and somewhat misleading numerical analysis that does not justify the constitutional violation here.

Another way of looking at the third and fourth factors together considers whether "the degree of remedial preference is tied to the effects of past disadvantages or discrimination." *Peightal v. Metropolitan Dade County,* 26 F.3d 1545, 1558 (11th Cir. 1994) (citation omitted). It seems obvious that a plan's tailoring is less "narrow" if it results in a very large degree of preference for minority group members (and corresponding disadvantage for non-minority group members) than if the degree of preference is smaller. This is certainly the situation if the degree of preference chosen is not in some way related to evidence bearing on the degree of discrimination to be remedied. See *Shurberg Broadcasting of Hartford, Inc. v. FCC,* 876 F.2d 902, 912-16 (Silberman, J., concurring).

In a situation, such as *Paradise,* where the exclusion had been total, it was far more plausible to enforce a draconian remedy, as the information necessary to any type of narrow tailoring was absent. In our case, we have ample information. We know that Black police officers had been hired at least as far back as the 1950s (5 on the force in 1957, 5 hired between 1952 and 1961); that at the 1973 and 1975 sergeant exams, those Blacks that applied passed the exam and were hired at roughly the same rate as whites; that over 10% of sergeants were Black by 1984; and that throughout the period between 1985 and 1991, Black representation at the sergeant level was roughly equal to or greater than such representation at the lowest officer level. Under these circumstances, it is impossible to find that a plan justifying a virtually unlimited degree of preference is narrowly tailored.

In order for the city to procure the necessary numbers of Black sergeants to meet the quota, the record shows that the degree of preference had to be very great. Based on the 1987 exam, twenty-one white officers were passed over to reach the first of the "preferred" Black officers, and an additional twenty-nine

had to be passed over before the process was complete. The differences in scores were considerable. Among white officers, the spread passed over was roughly from the 90th percentile to the 50th percentile of the test takers. In contrast, some Black applicants below the 50th percentile were taken. If race were not a factor at all, few observers would say that taking candidates from the bottom half of any ranking was equivalent to taking candidates from the top tenth, whether the job in question was electrician, baseball player, or symphony musician.

Further, we note that quotas and preferences are easily transformed from one into the other. Certainly, where the ranking criteria are already known, the correspondence is exact. In our case, if it were deemed objectionable to admit that there was a 1:1 quota, exactly the same result could have been reached by adding 20 points to the score of each minority applicant at the 1987 exam. A pre-existing commitment to a fixed amount of preference (as with a veterans' preference) has the result, in any given case, of determining exactly the proportion of the favored group that will be selected.

Even when the degree of preference is established in advance, knowledge of the general characteristics of the selection criteria and the applicant pool may well allow a close approximation, for each round of selection, of the desired quota outcomes. Thus, a 15-point preference might be known with confidence to produce approximately a 25% quota, a 20-point preference a 50% quota, and so on. Even though these figures will be more approximate and contingent than when the degree of preference is assigned after the fact, the general result and correlation will be the same. Justice Brennan noted this point in his opinion in *Bakke v. Regents of the University of California,* 438 U.S. 265, 378 (1978) (Brennan, J., concurring in part and dissenting in part).

Turning now to the fifth factor, the Flint Plan has drastically affected the rights of certain third parties. By denying certain otherwise eligible white candidates their earned opportunity to be promoted, an opportunity that has been denied for possibly as long as nine years, the plan denied to the plaintiffs salary increases, increased pensions, and related benefits, as well as the opportunity to accrue seniority to gain subsequent promotions to such higher ranks as lieutenant. While the Supreme Court has held that the denial of promotion opportunities is not as grievous an infringement of personal rights as are other sanctions like demotions, layoffs, or outright discharges, *see, e.g., Wygant,* 476 U.S. at 282-83, the denial of these opportunities for nearly a decade does constitute a very significant, and legally cognizable, adverse impact on the rights of third parties.

In sum, based on the five factors by which the courts have evaluated "affirmative action plans" for "narrow tailoring," we hold that the Flint Plan was not "narrowly tailored," as required to make its racial discrimination constitutional.

IV

Because the record of prior judicial findings, anecdotal testimony, and general labor-force statistics does not provide "a strong basis in evidence" that the Flint Plan serves a "compelling state interest" and because, in any event, it was not "narrowly tailored" to achieve the claimed interest, we **REVERSE** the district court's grant of summary judgment to the City of Flint, and hold that the Flint Plan's 1:1 quota for promotions is unconstitutional. We **REMAND** the matter for further proceedings consistent with this opinion, including determining whether any of the plaintiffs were actually injured by the application of the plan, and a determination of whether the city is continuing to practice a de facto quota-driven scheme under the guise of hiring and promoting from one unified list.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES MCCLELLAN, MARK CAMPBELL, AND THOMAS HILGENDORF,
Plaintiffs,

Civil Action
No. 90-CV-40148-FL

v.

THE CITY OF FLINT, A MUNICIPAL CORPORATION, AND THE FLINT POLICE OFFICERS ASSOCIATION,
Defendants.
_____ /

MEMORANDUM OPINION AND ORDER

Facts and Procedural History

This is a fourteenth amendment challenge to the City of Flint's affirmative action plan ("Plan") for promoting police officers to sergeant. The Plan established hiring requirements that may fairly be characterized as a 1:1 hiring quota. When the Flint Police Department requires additional police sergeants, it hires alternately a minority applicant and a caucasian applicant from the list of eligible applicants. Eligibility is determined by a test score, weighted for seniority of the applicant. *See* Defendants' Brief, Exhibit 4, in Support of Motion for Summary Judgment (1992). As a result of the quota, the eleven plaintiffs, who are white, male police officers, were passed over for promotion to

sergeant at least once and five plaintiffs were passed over twice. *See* Plaintiffs' Brief in Opposition to First Motion For Summary Disposition 2-3 (1991), and supporting affidavits.

The City established the Plan following hearings before the Flint Human Relations Commission ("HRC") in 1984.[1] The Commission took testimony from several witnesses regarding discrimination on the police force and considered prior judicial findings of discrimination on the police force and a statistical analysis of the police hiring and promotion record.

In August, 1984, the Commission issued its report making findings of past discrimination on the police force and recommended the implementation of the affirmative action plan.

The findings were supported by uncontroverted statistical evidence of under-representation of minorities in the Department. The Commission was provided with a labor force analysis of the Police Department prepared by a labor market economist. This report concluded that the Police Department had discriminated against minority applicants[2] both at the entry level and for promotion to sergeant. The former conclusion was based upon a comparison of the percentage of the minority qualified labor pool with the percentage of minority police officers. The latter conclusion was based upon a comparison of the percentage of minorities at the police sergeant level with the percentage of minorities that there would have been on the police force absent any discrimination in the hiring or promotion of entry level police officers.

---

[1] The Commission's hearings followed a series of special meetings by the Flint City Council concerning representation of minorities at the level of sergeant.

[2] According to the 1980 census, 93 percent of all Flint minority residents were African-Americans. Defendant's Brief, Exhibit 6 at 4.

Appendix B

In addition to this statistical evidence, the Commission took anecdotal testimony about discrimination on the police force from a variety of sources, including police officials and political figures, such as the Flint City Council President, Melvin McCree. Mr. McCree testified that the City Council had investigated the Police Department in 1981 and 1983 resulting in a finding that there was "a dramatic under-representation of minority persons in all ranks of the police department..." Defendant's Brief in Support of Motion for Summary Judgment (1992), Exhibit 5.

Police Chief Miles White testified and presented documentation that the police department had engaged in unlawful discrimination against minority persons in its hiring, *promotion* and assignment policies and practices. Flint Police Sergeant Evans and Flint Police Officer Dorris Roberts, President of the Afro-American Police League of Flint, testified about historical and *current* employment discrimination against minority persons in the police department in hiring, *promotions,* training and assignments. *See* Defendants' Brief, Exhibit 5, at A132. (findings of fact by the HRC).

Several relevant HRC findings are reprinted:

> 25. Fourteen persons were promoted off the current eligible list for police sergeants. All fourteen were white including one white female.
>
> 26. The current eligible list for police sergeant expires March 23, 1985. Without affirmative action initiatives the next twenty-one persons to be promoted to police sergeant from the current eligible list will be white.
>
> * * *
>
> 30. Having examined the submission of the chief of police, along with all of the other evidence presented, the

Commission finds that the statistical and anecdotal evidence of discrimination against minorities which was presented established a broad pattern of prior discrimination.

31. The Commission concludes that the currently appropriate labor market for police officer in the Flint police department is approximately 45% minority.

* * *

34. The Commission finds that reform of the police department's selection procedures is inadequate to remedy the present effects of prior discrimination and to provide for the operational needs of the department.

* * *

38. The Commission finds that implementation of a 1-to-1 promotional ratio until parity is achieved will not unnecessarily trammel the interests of non-minority officers.

39. The Commission finds that the objective of remedying the effects of past and present discrimination against minority persons in a timely fashion requires adoption of implementation ratios which serve to accelerate the effectuation of that remedy.

Id., at A134-35.

The Commission also considered that the hiring and promotional practices of the City have been subject to judicial scrutiny since the early 1970's. The City of Flint's minority population increased from approximately seventeen percent in 1960 to twenty-eight percent in 1970 and thirty-four percent in 1974. *Alfaro v. Suber,* Civil Action No. 613, May 18, 1977 (E.D.

Mich.) (unpublished op.). The HRC also cited several other court opinions as prior judicial findings of discrimination.[3]

On July 19, 1985, the Mayor presented to the Michigan Civil Rights Commission an affirmative action plan based upon the HRC's hearings that covered the entire city's workforce. The Commission approved the plan on January 27, 1986. In the meantime, the collective bargaining agreement between the City and the Flint Police Officers Patrolmen's Association was amended to accommodate the City's new plan. *See* Defendant's Brief, Exhibits 2-4.

The City's expert, Dr. Bendick, has provided a new study that buttresses the City's findings from 1984. The study takes the number of actual African-Americans on the police force as of January 1992 and adjusts it upward to reflect what the number would have been absent discrimination. He arrives at the adjusted percentage of 41.5 percent. That is absent past discrimination, the Flint Police Department would currently be composed of 41.5 percent minority police officers.[4] Therefore, Defendants contend the percentage of minorities among Flint Police Department police sergeants should also be 41.5 percent.[5] As of January 1,

---

[3] Many of these cases concerned discrimination that is not at issue in this lawsuit, e.g., on the Flint Fire Department.

[4] This figure is substantially less than Flint's minority population, which is 53.2 percent. It takes into account minimum educational requirements required for the police officer position, a high school diploma, and also discounts the numbers to reflect the applicant pool for police officers that comes from the largely white communities that are in the greater Flint area. *See* Defendant's Brief, Exhibit 7 at 17, 22-23.

[5] The City's expert has also suggested that the minority representation on the police force should ideally exceed the 41.5 percent figure. Defendant's Exhibit 7 at 21. However, his basis for this position is not that it would undo prior discrimination but rather that it would provide other benefits, such as advancing the operational needs of the Department.

1992, the Police Department was 4.4 minority sergeants, or 5.6 percent short of meeting the Plan's goal.

Plaintiffs contend that there is no proof of any past discrimination in the hiring of police sergeants, but only of entry level police officers. Plaintiffs' expert has determined that the correct comparison group is simply the number of minority police officers currently on the force, which is approximately 30 percent. As of January 1, 1992 the percentage of sergeants that were minority was 36 percent. In fact, plaintiffs claim that black sergeants are over-represented on the police force relative to the number of black policemen. Plaintiff's Brief at 14, Exhibit 6; testimony of Dr. Frank at 32-47, 55, 63-64.

According to plaintiffs, the City has simply misread the prior judicial decisions. These cases do not find discrimination at the promotional level, but only at the entry level. Moreover, the findings of entry level discrimination were quickly eradicated:

> It is clear from a review of the cases above that while there were judicial decisions finding that there was discrimination in the hiring at entry level positions, that those decisions also found that this discrimination was being eradicated as early as 1973 and that the implementation of a quota at the hiring level was inappropriate. Moreover these decisions make it clear that there was absolutely no judicial determination that the City of Flint had engaged in racial discrimination in promotion to the position of sergeant before the City of Flint decided to implement it's [sic] Affirmative Action Program for the position of sergeant in 1984.

Plaintiff's Brief at 6.

Plaintiffs present evidence from depositions that the Mayor of Flint ran on a campaign to institute affirmative action, and

therefore, speculate that he was prepared to institute the affirmative action policy regardless of the commission hearings. Thus, Plaintiffs contend, the City's motivation in implementing the Plan was an illegal one. *See e.g.*, Plaintiffs' Brief at 7, citing deposition of James Sharp, Mayor of Flint.

Plaintiffs also contend that because the hearings were not adversarial in nature, i.e., there was no cross-examination, they "were not hearings at all." Plaintiff's Brief at 9.

Plaintiffs also suggest that the City had less restrictive means than a quota available to it when it implemented the affirmative action plan. Plaintiffs' expert suggests that the test could have been validated as nondiscriminatory through an "assessment center."

LEGAL ANALYSIS

I. Standard of Review

To obtain summary judgment, Defendant must show there exists no genuine issue of material fact, and that it is entitled to judgment as a matter of law. *Bender v. Southland*, 759 F.2d 1205, 1210 (6th Cir. 1984). The evidence and all reasonable inference which may be drawn from the evidence is required to be viewed in a light most favorable to the party opposing summary judgment. *Id.*, at 1210-11.

Under *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), this Court must subject the Flint police sergeant affirmative action program to a strict scrutiny review. *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1989).

Under this exacting standard, the City must have had a compelling state interest when it enacted that Plan, and the Plan

must be narrowly tailored to further the compelling state interest. Under the stipulated facts, these are questions of law for the Court. *Bratton v. City of Detroit*, 704 F.2d 878, 898-899 (6th Cir. 1983), *modified on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

II. Did the City have a Compelling State Interest When It Adopted the Plan?

The major issue in the "compelling state interest" prong of strict scrutiny review is whether the City "had a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U.S. at 277; *Vogel v. City of Cincinnati*, 959 F.2d 594, 601 (6th Cir. 1992).

This Court bears in mind that under the dictates of *Croson* it must "smoke out illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." 488 U.S. at 493.

A. Procedures of the HRC

At the outset, the Court must dismiss Plaintiff's argument that the HRC's lack of adversarial proceedings or failure to adopt court rules invalidates its findings. This Commission performed a legislative and not a judicial function. The Court takes judicial notice of the absence of cross-examination in Congressional hearings. Nor is the Court familiar with any legislative body that adopts court rules. Legislative hearings are inherently more political than court proceedings, but that does not invalidate their findings.

Rather, the question is whether the HRC considered the proper type of evidence that could reasonably justify its findings of discrimination. A prior judicial finding of discrimination constitutes the strongest evidence that the Court could consider. However,

such a finding is not necessary. Other types of evidence that a legislative body may use are statistical evidence and anecdotal evidence: "Evidence of wide statistical disparity, however, may justify an affirmative action policy adopted by a public employer." *Vogel v. Cincinnati*, 959 F.2d 594, 599 (6th Cir. 1992) *quoting Wygant*, 476 U.S. at 274-75 (citing *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)). *See also, Croson*, "['w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern of discrimination.' " 488 U.S. at 501. (*quoting Hazelwood School Dist.*, 433 U.S. at 307-08).

B. The HRC's Reliance on Prior Judicial Findings

In 1973, this Court issued a preliminary injunction suspending the use of a written examination and of college credits as a requirement to become a patrol officer. *Holliman v. Price*, 9 Fair Empl. Prac. Cas. (BNA) 1363, 1372 (1973). That order held that the City had failed to comply with the requirements of a federal law[6] requiring the elimination of barriers to hiring minorities when it accepted federal funds to hire patrolmen. *Id. Holliman* did not address the issue of promotion.

In the 1970s, the Flint Police Department instituted a 1:4 quota system as part of a consent decree in *Flint Police Patrolmen's Association v. City of Flint*, no. 74-33234-CL, December 2, 1974. (E.D. Mich. unpublished op.) This system was only to stay in effect until fifteen percent of sergeants were minority.

---

[6] Section 6(a) of the Emergency Employment Act of 1971, 42 U.S.C. §§ 4871 et seq. and regulations codified at 29 C.F.R. § 55.3, 55.6. This law was superseded by the Comprehensive Employment and Training Act of 1973, Pub. L. 93-203, 87 Stat. 839, codified at 29 U.S.C. § 841 et seq..

Minority police officers challenged the sufficiency of that system in *Alfaro v. Suber*, Civil Action no. 613, May 18, 1977 (E.D. Mich. 1977) (Harvey, J.) (unpublished op.). Judge Harvey, while finding discrimination at the entry level in the police force, found that the 1970, 1973 and 1975 sergeants' examination did not result in a sufficient disparity between black and white applicants to hold that the examination was discriminatory. Judge Harvey did not consider, however, the type of statistical analysis for a disparate impact analysis that Defendants put forward in 1984 or in the case at bar, in which discrimination at the entry level is taken into account in determining the need for affirmative action at the promotion level.

The consent order was again challenged, this time by white police officers, in *Waldron v. Flint Police Patrolmen's Association,* no. 75-40084, appended as Exhibit 10 to Defendants' Brief. In an order dated September 28, 1981, Magistrate Harvey D. Walker's Opinion and Recommendation of March 4, 1980 was adopted as the Court opinion. That opinion found for Defendants and against the white police officers. It noted:

> In the case at hand no Plaintiff has been terminated. The Plaintiffs have at the most suffered some delay in expected promotion.

Memorandum Opinion and Recommendation at 7.

The opinion then held the following regarding the 42 U.S.C. § 1983 claim:

> Therefore, inasmuch as this Court has heretofore made a finding that the Plaintiffs have not proven a deprivation of any of their Constitutional rights by the terms of the Consent Judgment, there is no remedy which the Plaintiffs may avail themselves of under this Section of the U.S. Code."

Id., at 10.

The *Waldron* opinion therefore explicitly upheld a quota in the hiring of police sergeants under the Fourteenth Amendment.

These opinions comprise the judicial backdrop of race discrimination at the Flint Police Department that the HRC considered in determining that that there was a history of discrimination on the police force.[7] While the cases demonstrate the existence of racial discrimination in the Police Department, they do not constitute sufficient evidence to indicate the need for a 1:1 quota in the hiring of police sergeants.

The clearest case providing evidence of discrimination at the promotional level is *Waldron*, to which no specific reference was made. While the HRC's findings of prior judicial determinations of discrimination in promotions can reasonably be attributed to a familiarity with *Waldron*, even that case does no more than to uphold the prior quota of 1:4 up to fifteen percent. The HRC must, therefore, have relied upon other findings to "constitute a sufficient basis in evidence" of the need to establish the Plan.

C. Anecdotal Evidence

The anecdotal evidence of discrimination is considerable and worthy of weight. The HRC took testimony from several insiders on the police force as well as from members of the community. Indeed, the chief of police testified to *continuing discrimination on the police force*. Testimony from such a well-placed source that supports the creation of an affirmative action plan with an admission of continuing discrimination is not routinely found in the record in affirmative action cases.[8]

---

[7] *Waldron, supra* is not specifically cited in the HRC's findings.

[8] Undoubtedly, one reason is that such comments could be admissible in a civil rights lawsuit against the City by a minority plaintiff.

Appendix B

While the anecdotal testimony serves to show a culture on the police force that is discriminatory, it does not, by itself, provide the necessary support for the establishment of a quota in the hiring of police sergeants. Indeed, the testimony of the police chief provided *de facto* evidence that the new leadership of the police department had a sensitive attitude towards minority hiring and promotion.

Thus, for the HRC to have found a "sufficient basis in evidence" to recommend the establishment of a promotion quota, statistical evidence must support that decision.

D. The Choice of Statistics: Which Comparison Group Matters?

In *Croson*, the Court held that it would only find a compelling state interest for a city's affirmative action program if the city had previously discriminated against the group of people benefitted by the Plan. A result of *Croson* is a continuation of the battle to define the relevant groups for purposes of comparison. This is an issue that continues to bedevil Title VII litigation as well. *See e.g.*, David D. Meyer, Note, *Finding a "Manifest Imbalance": The Case for a Unified Statistical Test for Voluntary Affirmative Action Under Title VII*, 87 Mich. L. Rev. 1986 (1989).

There is, for instance, the general population of minority and non-minority individuals within a given area. After *Croson*, that is never the relevant group for comparison. *Vogel*, 959 F.2d at 600. The parties dispute exactly who is the group with which the percentage of minority police sergeants should be compared. The City claims that the basis for comparison is the number of minorities that would serve on the police force absent discrimination at the entry level or promotional level in the Police Department.

Appendix B

The City's labor market economist has demonstrated that absent past discrimination at both the entry level and at promotion to sergeant, the percentage of minority sergeants would be 41.5 percent.[9] Plaintiff's expert suggests that the City's expert chose an incorrect figure by considering the effect of the discrimination at the entry level as influencing the discrimination at the promotion level. However, the Supreme Court has specifically determined that the City's approach is proper.

In *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed. 2d 203 (1987), the Court upheld a 1:1 quota for promotions to corporal in an Alabama public safety department. The Court clearly rejected the defendants' argument that the quota could not be applied to promotions:

> [Defendants] argue that no remedial relief is justified in the promotion context because the intentional discrimination in hiring was without effect in the upper ranks, and because the Department's promotional procedure was not discriminatory. There is no merit in either premise.
>
> Discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities.

480 U.S. at 168.

When the City commenced the Plan in 1984, the percentage of sergeants that were minority was 10.8 percent; whereas the

[9] Plaintiffs charge that the City's expert and the City relied upon general population statistics in establishing the plan. A review of the HRC report and the City expert's report from 1984 shows this plainly not to be the case. While the general population figures are mentioned, the key discussion looks to the relevant labor market, exactly what the Supreme Court has instructed is appropriate.

percentage of sergeants who would have been minority absent past discrimination in 1984 was 31.1 percent. Defendant's Brief in Support of (first) Motion for Summary Judgment, (filed October 11, 1991), Exhibit B, at A119 (Table Three). Since 1984, however, as the percentage of minorities in the applicable labor pool has increased, so has the degree of expected representation of minority sergeants on the police force. That is why, by 1992, Defendant's expert has stated that one would expect the percentage of minority sergeants to be 45.1%.

The discrepancy between the expected number of minority sergeants and the actual number of minority sergeants was, at the time of the adoption of the Plan, considerable: 10.1% v. 31.1%. When combined with the powerful anecdotal accounts of continuing racism in the Department, the statistical evidence provides the "sufficient basis in evidence" for this Court to find a compelling state interest to adopt the plan

Plaintiffs' allegations of a predisposed city administration do not undermine the fact finding that the City performed to justify its adoption of the Plan.

III. Is the plan narrowly tailored?

The Supreme Court has identified several factors in determining whether an affirmative action plan is narrowly tailored:

* the necessity of relief;
* efficacy of alternative remedies;
* flexibility and duration of the plan including the availability of a waiver
* relationship of the numerical goals to the relevant labor market;
* impact of the relief on the rights of third parties.

Appendix B

United States v. Paradise, 480 U.S. 149, 171, 107 S.Ct. 1053, 1066, 94 L.Ed.2d 203 (1987).

A. Necessity of Relief

The history of discrimination on the police force, as shown through the statistical and anecdotal evidence, when combined with prior judicial intervention that had been unable to end the lack of representation of minorities on the police force made it plain in 1984 that relief was necessary.

B. Efficacy of Alternative Remedies.

Plaintiffs argue that alternative selection criteria could have been employed in choosing sergeants. However, they ignore the fact that several other remedies, including a 1:4 quota system, *see Waldron, supra*, had been previously attempted. In spite of efforts dating back to the early 1970s to increase the number of black police sergeants, the numbers were still quite low. It therefore seems highly unlikely that a mere adoption of an assessment center's evaluation of the selection criteria would result in racial representation at the sergeant's level.

Indeed, in the absence of a quota, underrepresentation would continue until an entire generation of police sergeants retired. This result would occur because no proposed change in selection criteria would yield *greater* numbers of minorities than their proportion in the population. Thus, even assuming a racially unbiased selection criteria were put into place in 1984, so long as the police sergeants who served up until that time remained on the force, minority representation would be low relative to the number of qualified minority applicants. The result would be the continuation of the effects of prior discrimination for many years in the future.

Therefore, it was reasonable for the Plan to adopt a 1:1 quota.

C. Flexibility and Duration of Plan

There has been no suggestion that the minorities appointed to sergeant are not qualified. *Cf. Paradise,* 480 U.S. at 177-178. This plan is not of indefinite duration. The *Paradise* Court also upheld a plan with a long duration. Judge Gadola, in *Detroit Police Officers Ass'n. v. Young*, 765 F. Supp. 393, 396 (E.D. Mich. 1991) upheld a 1:1 Plan with a sixteen year duration as reasonable. This Plan will probably expire this year or next year, eight to nine years after inception.[10] Moreover, as in *Young*, the Plan has been flexible in allowing the positions to be filled as needed, and not requiring minorities to be hired regardless of the need for sergeants. Therefore, this plan is sufficiently flexible and of reasonable duration.

D. Relevant Labor Market

This issue has been adequately addressed in the analysis under the "compelling state interest" prong. The same analysis demonstrates that the Plan is narrowly tailored. The Plan employed the 41.5% figure because it reflects the percentage of qualified minorities that would be on the police force absent discrimination. *Compare Young*, 765 F. Supp. at 397, in which the Court found that fifty percent black police officers and investigators was "sufficiently related" to the Department's end goal of fifty percent in promotions. For the reasons discussed *supra*, the Court finds *Paradise* provides authority for the statistical analysis that removes the effect of prior discrimination to determine the relevant qualified pool.

---

[10] That is, the part of the Plan at issue in this case, concerning the promotion to sergeant will soon meet its stated goal.

E. Impact on Third Parties

The Supreme Court has said that unlike the discharge of workers, the granting of promotions is a less painful way to effect affirmative action. Thus, in the *Paradise* case, the Supreme Court upheld a rigid hiring quota on a police force; whereas, the Court struck down race-based layoffs in *Wygant*, 476 U.S. at 282-83 ("Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job."). Thus, the case at bar may be distinguished from *Long v. City of Saginaw*, 911 F.2d 1192 (6th Cir. 1990), in which the Sixth Circuit struck down Saginaw's decision to lay off police officers to conform to affirmative action goals.

As to Plaintiffs' argument that less restrictive means were available in this case, considerable evidence remains that this simply was not the case. For instance, regarding the sergeants examination results from 1976-1979, *Plaintiff's* expert has noted, "the proportion of white candidates passing is roughly double the proportion of black candidates passing the examination." Defendant's Reply Brief, Exhibit A. This troubling result occurred *after* Judge Harvey's *Alfaro* decision finding no bias in the selection process for sergeant.

Plaintiff's suggestion that alternate tests be used has been implemented as part of the plan. Plaintiffs are unable to demonstrate how their proposed changes acting alone would have overcome the rather drastic effects of prior discrimination on minority representation on the force. After a thirteen year history of government efforts to integrate the police force through moderate means, the City acted reasonably to impose the 1:1 quota.

This Court is unable to find that any other measures would have eliminated the effects of prior discrimination.

V. Continuation of the Plan?

Does the City have a compelling state interest to continue the Plan once the 41.5 percent goal is attained?[11] The City's expert has suggested that "operational needs" and "operational efficiency and effectiveness" would be enhanced by increasing the percentage of minority representation at the sergeant's level until 53.2 percent of the sergeants are minority. *Defendant's Brief,* exhibit 7 at 20-21. This number reflects the Flint minority population.

This goal is plainly insupportable under current law. Goals other than remediation of prior discrimination of a particularized group cannot serve as the basis for an affirmative action program by a state entity. *Croson,* 488 U.S. at 493. The City cannot now amend the Plan to choose the general population as the basis for comparison.

Therefore, the City must cease the operation of the Plan as it relates to the hiring or promotion of police sergeants as of the date that minority representation of police sergeants reaches 41.5 percent.

V. Conclusion

A. There is no material issue of genuine fact as to whether the Human Rights Commission found sufficient evidence of prior discrimination to find a compelling state interest in the adoption of the affirmative action plan.

B. The Plan is narrowly tailored.

---

[11] This question is ripe for review since the City is on the verge of meeting its goal of 41.5 percent minority police sergeants.

C. Summary judgment is therefore granted for the City of Flint on all remaining counts.

D. The Plan shall cease to operate in connection with the hiring of sergeants on the date that the percentage of police sergeants that are minority reaches 41.5 percent. On that date, a new promotion or hiring policy shall be placed into effect in which sergeants shall be hired on a color-blind basis. After that date, the City may not institute any race-based hiring of sergeants absent the establishment of a new affirmative action plan in accordance with constitutional requirements.

In addition, all previously imposed limits on the City's ability to establish criteria to hire sergeants, such as education and testing requirements, that were ordered by the federal district court in Flint are hereby revoked as of the date that the Plan no longer applies to the selection of sergeants.

SO ORDERED.

/s/ STEWART A. NEWBLATT

STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

Date: 1/7/93

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES MCCLELLAN, MARK CAMPBELL, AND THOMAS HILGENDORF,
Plaintiff.

Civil Action
No: 90-CV-40148-FL

v.

THE CITY OF FLINT, A MUNICIPAL CORPORATION, AND THE FLINT POLICE OFFICERS ASSOCIATION,
Defendants.
_____ /

MEMORANDUM OPINION AND ORDER

Before the Court is defendant City of Flint's Motion to Dismiss and for Summary Judgment, and plaintiffs' Response. A hearing regarding this matter was held on November 18, 1991. The issues raised by defendant's motion are: (1) whether plaintiffs' claims are barred by the statute of limitations; (2) whether plaintiffs' 42 U.S.C. § 1981 claim must be dismissed for failure to plead, and provide facts supporting the position, that plaintiffs' promotion to sergeant would create a new contractual relationship between the parties; and (3) whether plaintiffs' claim under the Elliott-Larsen Act must be dismissed because the City's Affirmative Action Plan was approved by the Michigan Department of Civil Rights. For the reasons that follow, as stated on the record, defendant's motion is GRANTED IN PART and DENIED IN

PART. With regard to defendant's arguments that plaintiffs' claims are barred by the statute of limitations, and that plaintiffs' § 1981 claim must be dismissed, the motion is DENIED. To the extent that defendant seeks dismissal of plaintiffs' Elliott-Larsen claim, defendant's motion is GRANTED.

This action arises out of defendant's promotion of minorities to the rank of police sergeant over plaintiffs, pursuant to the City of Flint's ("City") Affirmative Action Plan ("AAP") which was adopted by the City in 1984. Since August, 1984, the City has used two promotional lists when making promotions from the rank of police officer to the level of sergeant, one list comprised of non-minorities, the other comprised of minorities (defendant's Motion at 2). On May 16, 1990, plaintiffs filed a three count Complaint alleging that the City's promotional practices, which are embodied in a collective bargaining agreement and which arise from the City's AAP, violate their equal protection rights in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the Michigan Elliott Larsen Civil Rights Act, M.C.L. § 37.2101, *et seq.* (defendant's Motion at 1). The plaintiffs claim that they were denied promotions based upon their race (defendant's Motion at 2).

At pages one and two of its brief, defendant provides a factual history of the implementation of the AAP. Upon the request of then Mayor James Sharp, Jr., in April 1984 the Civil Rights Committee of the Flint Human Resources Commission ("HRC") conducted public hearings on the need for affirmative action in the City's police and fire departments. Numerous individuals and groups attended the hearings and provided statistical evidence regarding the need for an AAP. The information gathered was studied by the HRC throughout the summer of 1984, resulting in the HRC's issuing of a "Resolution Concerning Affirmative Action — Promotions in Flint Police Department"

(defendant's Motion at exh. C). "In this resolution, the HRC concluded that the prior discrimination against minorities in promotions within the police department justified the implementation of an affirmative action policy to overcome the past and present effects of discrimination" (defendant's Motion at 2). The HRC also approved the AAP (*see* AAP, defendants Motion at exh. D). The City's AAP was submitted to the Michigan Department of Civil Rights, pursuant to § 210 of the Elliott-Larsen Act, and was formally approved on January 27, 1986 (defendant's Motion at exh. G).

There are eleven plaintiffs in this lawsuit, all white male police officers of the City of Flint. Nine plaintiffs claim they were passed over for promotion to sergeant within three years from May 16, 1990 (plaintiffs' Response at 2).[1] Two plaintiffs claim they were denied promotion shortly after this suit was filed in October 1990 (plaintiffs' Response at 2).[2] Of those plaintiffs who were passed over for promotion in 1987, who did not specify a month or date upon which the alleged discriminatory denial took place, plaintiffs argue that the record establishes that applications were taken on May 21, 1987, the exam was given on June 23, 1987, and the plaintiffs were notified of eligibility on July 15, 1987 (plaintiffs' Response at 3), *see* "Eligible List," plaintiffs' Response at exh. 9).[3] Moreover, five plaintiffs allege that they have been victims of a continuing pattern of discrimination and thereby have been denied promotion on the basis of Race on occasions

---

[1] These nine plaintiffs are Maynard Newman, Barry Saunders, James McLellan, Thomas Hilgendorf, Charles Middleton, Robert Lorey, Stephen Hill, Brian Sepanak, and Bruce Sepanak.

[2] These two plaintiffs are Gregory Doerr and W. Osmund Kelly, III.

[3] The Court notes that all three of these dates are within three years of the filing of plaintiffs' Complaint.

which occurred more than three years prior to initiation of this lawsuit (plaintiffs' Response at 3).[4]

I

The Court first will address the third issue raised by defendant's motion: that plaintiffs' Elliott-Larsen claim must be dismissed because the AAP was approved by the Michigan Civil Rights Commission in 1986. Section 210 of the Elliott-Larsen Act provides that:

> A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.

M.C.L. § 37.2210. Moreover, section 705(2) of the Act states that:

> This act shall not be interpreted as restricting the implementation of approved plans, programs, or services to eliminate discrimination and the effects thereof when appropriate.

M.C.L. § 37.2705(2). The Michigan Court of Appeals has held that if a voluntary affirmative action plan is submitted to, and approved by, the Civil Rights Commission, protection from legal action is guaranteed; compliance with section 210 is a complete defense. *Kulek v. City of Mt. Clemens,* 164 Mich. App. 51, 415 N.W.2d 321 (1987); *Ruppal v. Dep't of Treasury,* 163 Mich. App. 219, 413 N.W.2d 751, 758 (1987); *see also Victorson v.*

[4] These five plaintiffs are Middleton, Newman, McLellan, Hilgendorf, and Lorey.

Dep't Of Treasury, 183 Mich. App. 318, 321-22, 454 N.W.2d 256, 259 (1990).

The City's AAP was submitted to the Civil Rights Commission on July 19, 1985, and on February 13, 1986, the Commission notified the City that the Plan had been approved on January 27, 1986. This Plan is the basis of the allegedly discriminatory promotion denials. Therefore, plaintiff's claims that the City violated the Elliott-Larsen Act by making hiring and promotional decisions pursuant to the approved AAP must be DISMISSED.

Plaintiffs' Supremacy Clause argument misses the point. It is true that if defendant's AAP violates plaintiffs' federal constitutional rights, state approval of the Plan would be ineffective against such constitutional claims. Nevertheless, the fact that plaintiffs have a federal constitutional claim does not affect their ability to sue under a state civil rights statute. The Elliott-Larsen Act does not purport to insulate absolutely defendant's AAP from attack. Sections 210 and 705(2) of the Act, however, sanction such approved plans, protecting them from action taken pursuant to the Act itself. Even if the Plan violates the federal constitution, that does not provide a cause of action under the Elliott-Larsen Act, since the Act is inapplicable by its own terms.

II

The parties do not dispute that the three year statute of limitations period contained in the Elliott-Larsen Act governs plaintiffs' claims of discrimination in violation of 42 U.S.C. § 1981 and § 1983. *See Gomez v. Great Lakes Steel Div. Nat. Steel Corp.,* 803 F.2d 250, 253 (6th Cir. 1986) (§ 1981); *Carroll v. Wilkerson,* 782 F.2d 44, 45 (6th Cir. 1986) (§ 1983). The parties do not agree, however, as to the time at which the statute of limitations began to run. Defendant argues that in a

discrimination in employment case, the statute begins to run at the time the plaintiff becomes aware of the alleged discriminatory practice at issue (defendant's Motion at 4). In this case, argues defendant, the statute began to run when plaintiffs became aware of the City's AAP in 1986 (*id.*). Plaintiffs, on the other hand, argue that in an action under the Elliott-Larsen Act claiming a discriminatory promotion decision the cause of action accrues after the actual denial of the promotion sought, regardless of when notice of the Plan or notice of the denial is given (plaintiffs' Response at 5). Evidently, plaintiffs would have the Court apply this time of accrual to the federal claims as well.

According to the Sixth Circuit, although state law provides the statute of limitations for an action under § 1981 or § 1983, federal law determines when that limitations period begins to run. *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). In their briefs and at oral argument, the parties have cited several federal cases which they claim are dispositive on the statute of limitations issue (*see* defendant's Motion at 4-6). *See Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989); *Janikowski v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987); *Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981); *Chambers v. Parco Foods, Inc.*, 935 F.2d 902 (7th Cir. 1991); *Kuemmerlein v. Madison Metro. School Dist.*, 894 F.2d 257 (7th Cir. 1990).

A. Claims of separate violations

In *Chambers v. Parco Foods, Inc.*, the plaintiff brought a Title VII action alleging that the defendant's departmental seniority system, where employees in one department were not allowed to bid for jobs in other departments, discriminated against her on the basis of sex. 935 F.2d at 903. The specific provision precluding inter-departmental bidding was negotiated by the union and implemented into the collective bargaining agreement

in 1979. *Id.* Plaintiff filed her complaint in 1988 after she was refused the opportunity to bid outside her department in 1987. *Id.* at 904. In holding that the complaint was time-barred, the Seventh Circuit focused on when the plaintiff experienced a "diminution in employment status." *Id.* at 905. The Court held that the plaintiff's diminution in employment, her inability to make a transfer bid, "occurred in 1979 when the agreement's terms were changed from previous agreements." *Id.* The discriminatory act which triggered the statute of limitations, therefore, was the time of adoption of the objectionable bidding policy. *Id.* at 906.

In *Kuemmerlein v. Madison Metro. School Dist.*, the plaintiffs were two white male teachers who had been laid off in 1982 while several minority teachers with less seniority were retained, pursuant to a collectively bargained affirmative action program. 894 F.2d at 258. The plaintiffs brought an action under § 1983, alleging racial discrimination in defendants' layoff decisions. *Id.* The plaintiffs received layoff notices on March 2, 1982 and were terminated on August 23, 1982 (the first day classes were held without plaintiffs' employ). *Id.* at 259. The plaintiffs did not file their complaint until May 11, 1988. *Id.* Applying *Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981), and *Delaware State College v. Ricks*, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), the Seventh Circuit held that "the statute of limitations runs from the date of notice, not from the date of actual termination." *Kuemmerlein*, 894 F.2d at 259. Therefore, Wisconsin's six year statute of limitations had run out on March 2, 1988, two months before plaintiffs filed their complaint.

The statute of limitations begins to run at the occurrence of the "discriminatory act, not the point at which the consequences of the act become painful." *Id.* citing *Chardon*, 454 U.S. at 8; 102 S.Ct. at 29; *Ricks*, 449 U.S. at 258, 101 S.Ct. at 504; and

Appendix C

Lorance v. AT&T Technologies, 490 U.S. 900, 109 S.Ct. 2261, 2266 n.3, 104 L.Ed.2d 961 (1989). In *Kuemmerlein*, the Court of Appeals found that "[p]laintiffs' actual termination only made painful the consequences of the discriminatory act: the allegedly illegal act was the layoff decision itself." 894 F.2d at 260.

Applying the *Kuemmerlein* decision to the instant action, the discriminatory act would have been the actual denial of promotion to plaintiffs: the allegedly illegal act. Defendant argues that, in this case, implementation of the AAP in 1984 is the alleged discriminatory act which started the statute of limitations running (defendant's Motion at 6). Defendant argues that "[a]ll of the Plaintiffs were thus on notice that the City had adopted a Plan *which may affect* their employment status" (defendant's Motion at 6 (emphasis added)). That an employer's action *may* affect an employee's status, however, is not sufficient. Implementation of the AAP did not affect plaintiffs. Unlike the adoption of a seniority system, by which an employee's rights and interests are immediately altered, the adoption of an affirmative action plan for hiring and promotions does not alter an employee's status. The AAP only told plaintiffs that the City would, in the future, use certain criteria for making its employment decisions. Only when they were denied promotion pursuant to the AAP did plaintiffs incur a diminution in employment.

The statute of limitation began to run when plaintiffs received notice of the allegedly discriminatory conduct. *Kuemmerlein*, 894 F.2d at 259. To the extent, and for those claims, that plaintiffs were denied promotion to sergeant and received notice thereof after May 16, 1987, plaintiffs' claims are not barred by the statute of limitations. With regard to these claims, defendant's motion is DENIED.

Appendix C

B. Claims of continuing violation

In *Conlin*, similar to the present action, the dispute involved plaintiffs being passed over for promotion in favor of others, pursuant to the State of Michigan's Affirmative Action Plan. In that case, the plaintiff Ruppal challenged the refusal to promote him in September 1984, and the plaintiff Victorson challenged the denial of a promotion in July 1983. 890 F.2d at 815. The plaintiffs did not file their lawsuit until April 1988, well outside the three year statute of limitations period. Among other claims, Ruppal and Victorson contended that there was a pattern of continuing violations that continued well within the limitations period. *Id.* In examining this claim, the Sixth Circuit stated that, "[i]n order to allege a continuing violation with regard to employment decisions, a court is to look at what event " 'should have alerted the average lay person to protect his rights.' " *Id.* quoting *Dumas v. Town of Mount Vernon, Ala.*, 612 F.2d 974 (5th Cir. 1980). In *Conlin*, the Court of Appeals found that the plaintiffs "were certainly aware of the general affirmative action policies at the time of their promotion denials." *Id.* Therefore, the district court correctly dismissed the plaintiffs' "continuing violations" claim under the appropriate statute of limitations. *Id.*

In *Roberts*, 650 F.2d 823, a Title VII action, the Sixth Circuit directly addressed the continuing violation doctrine. Upon applying for a position with defendant North American Rockwell Corp., the plaintiff in *Roberts* was denied a job at Rockwell because she was a woman. *Id.* at 824. The plaintiff periodically returned to Rockwell's employment office to inquire as to the status of her application and was repeatedly told that she would not be hired because she is a woman. *Id.* at 824-25. The plaintiff brought suit against Rockwell on January 6, 1978.

Appendix C

In determining whether the plaintiff's action was barred by the statute of limitations, the court noted that "[t]his case illustrates the continuing violation doctrine well." *Id.* at 827. Because she was challenging Rockwell's discriminatory policy, and because she was continually applying for a position of employment — each time being rejected — the court determined that the violation was an ongoing one. *Id.* Moreover, the court cited important policy reasons why the plaintiff's action should not be barred:

> Title VII advances important federal goals. To require that suit be filed at the first instance of discrimination or not at all would frustrate Title VII. Broad, remedial acts such as Title VII should be liberally construed to encourage the eradication of discrimination.

Id. The court held that because part of the continuing violation occurred within the statute of limitations period, the entire continuing violation was still actionable.

Application of *Conlin* and *Roberts* to this case is difficult. The Court notes that in *Roberts*, a Title VII action, the plaintiff was permitted to bring suit over incidences that occurred beyond the statute of limitations period because there was an over-arching discriminatory hiring policy which continued into a period of time within limitations period and adversely affected the plaintiff during that actionable time. In *Conlin*, however, a suit brought pursuant to § 1983, the plaintiffs were barred from bringing suit challenging a policy that too continued into the statute of limitations period, but during which time there was not an adverse employment action taken against them. Defendant herein contends that in *Conlin* the Court of Appeals limited their holding in *Roberts* to Title VII actions, and that in § 1983 actions the statute of limitations period begins to run on the very first

occasion that the plaintiffs knew or should have known of the discriminatory policy that would adversely affect their rights. This interpretation of *Conlin* is possible, based upon the court's reasoning that a court must look at what event should have alerted the average lay person to protect his rights. As in *Conlin*, the plaintiffs in this case "were certainly aware of the general affirmative action policies at the time of their promotion denials." 890 F.2d at 815.

This Court, however, does not read *Conlin* to have such a limiting effect upon the *Roberts* court's adoption of the continuing violations doctrine. Specifically, the Court notes that in *Conlin*, the plaintiffs did not plead that there were any other deprivations of their constitutional rights which affected them within the limitations period. Moreover, where you have a discrete act of discrimination — a particular person is not promoted by her superior for some prohibited reason — that is a different situation from when an employer has an overall policy which will continue over a period of time. The cases cited by the parties all talk about a continuing violation where there is a policy affecting a particular classification of people defined by some prohibited discriminatory characteristic. In this case it is alleged that discrimination is against every white male on the basis of race. Whether numerous separate denials of promotion, some within and some beyond the statute of limitations period, are actionable because they are all based upon a single, continuous, discriminatory policy is a legal question that must be clarified by the Sixth Circuit. Based upon the current state of the law, however, I cannot deprive these plaintiffs from having their cause of action resolved on the merits. Therefore, to the extent that defendant seeks to dismiss plaintiffs' § 1983 claim upon statute of limitations grounds, defendant's motion is DENIED.

III

The final issue raised by defendant's motion is whether plaintiffs' claim under 42 U.S.C. § 1981 should be dismissed for failure to show that the denial of promotion prevented plaintiffs from entering into a new contractual relationship. Count II of plaintiffs' Complaint alleges a violation of section 1981 in their promotion denial. Section 1981 guarantees to "[a]ll persons... the same right in every State... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..." 42 U.S.C. § 1981. The protection offered by this statute applies equally to whites as well as blacks. *McDonald v. Santa Fe Transportation*, 427 U.S. 273, 286-87, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976). Section 1981 only provides relief, however, for discriminatory "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 2374, 105 L.Ed.2d 132 (1989).

> [T]he question whether a promotion claim is actionable under § 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer. If so, then the employer's refusal to enter the new contract is actionable under § 1981. In making this determination, a lower court should give a fair and natural reading to the statutory phrase "the same right ... to make ... contracts," and should not strain in an undue manner the language of § 1981. Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under § 1981.

Patterson, 491 U.S. at 185, 109 S.Ct. at 2377. The question here, assuming for this motion that defendant's actions were discriminatory, is whether the promotion to sergeant would have provided a new and distinct contractual relationship between plaintiffs and defendants.

This final determination is a close one. Plaintiffs have provided evidence, mostly by way of affidavit of plaintiff Middleton, that the promotion to sergeant does alter the employment relationship in a significant way (plaintiffs' Response at exh. 1). Furthermore, plaintiffs provide the first few pages of the different contracts that have been negotiated on behalf of police officers and sergeants (plaintiffs' Response at exh. 2). I cannot determine from what is provided whether the terms of the contracts are significantly different. Because they are apparently separately bargained for contracts, however, and given the significantly greater responsibility alleged in Middleton's affidavit, if there is not enough evidence presented to create a jury question on plaintiff's § 1981 claim, there is at least enough of a material dispute of fact to preclude summary judgment for defendant at this time, Therefore, with regard to this issue, defendant's motion is DENIED.

Appendix C

DISPOSITION

For the foregoing reasons, and for the reasons stated on the record, defendant's Motion to Dismiss or for Summary Judgment is HEREBY GRANTED IN PART and DENIED IN PART. Plaintiffs' claim under the Elliott-Larsen Civil Rights Act is DISMISSED. With regard to the remainder of plaintiffs claims, defendant's motion is DENIED.

SO ORDERED.

/s/ STEWART A. NEWBLATT

STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

Date: 7/29/92

Appendix D

Nos. 93-1367/1368

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES MIDDLETON, ET AL.,
Plaintiffs-Appellants/
Cross-Appellees,
v.
THE CITY OF FLINT,
Defendant-Appellee/
Cross-Appellant,
FLINT POLICE OFFICERS ASSOCIATION,
Defendant.

ORDER

Before: KRUPANSKY, BOGGS, and SUHRHEINRICH, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN

LEONARD GREEN, CLERK

Appendix E

UNITED STATES CONSTITUTION

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

42 U.S.C.A. § 1981

§ 1981. Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, given evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

(As amended Nov. 21, 1991, P. L. 102-166, Title I, § 101 105 Stat. 1071.)

Appendix G

42 U.S.C.A. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R. S. § 1979; Dec. 29, 1979, P. L. 96-170, §1. 93 Stat. 1284.)

Appendix H

ADDENDUM TO THE JULY 1, 1983 TO JUNE 30, 1984 COLLECTIVE BARGAINING AGREEMENT

Appendix H

ADDENDUM TO THE JULY 1, 1983 TO JUNE 30, 1984 COLLECTIVE BARGAINING AGREEMENT BETWEEN THE CITY OF FLINT AND THE FLINT POLICE OFFICER ASSOCIATION FOR THE PERIOD JULY 1, 1983 TO JUNE 30, 1985

The parties hereby agree that their July 1, 1983 through June 30, 1984 Collective Bargaining Agreement shall remain in full force and effect except as specifically modified by this agreement. This agreement was negotiated pursuant to the Affirmative Action Letter and Article 66 of the Collective Bargaining Agreement.

1. Article 69, the first paragraph shall be amended to read as follows:

> "This agreement shall be effective for the period July 1, 1983, through June 30, 1985 (except for the amended provisions of Article 38, which shall remain in full force and effect for a period of five (5) years from the date of ratification of this agreement), and shall continue thereafter for successive periods of one (1) year unless either party shall, at least ninety (90) days prior to June 30, 1985, serve written notice on the other party of a desire to terminate, modify, alter, renegotiate, change or amend this agreement.

2. Article 38: Promotions shall be amended by adding the phrase "other than those hereinafter set forth" after the word

"Sergeant" in the first sentence and adding the following provisions:

Section 1. In making promotions to the rank of Sergeant, should the City find it appropriate, it shall have the right to maintain two separate promotional lists, one consisting of eligible minorities and one of eligible non-minorities — both lists to be made up of those police officers who have successfully passed the promotional examination for Sergeant. Under such circumstances, promotions may be made on the basis of a ratio not to exceed one eligible minority for every eligible non-minority promoted.

Section 2. It is further agreed that future promotional lists shall only last for a period of eighteen (18) months.

Section 3. The City agrees that before the expiration of the current promotional list (March 23, 1985), and thereafter during the life of this amended Article 38, (i.e. five year period) subject to existing millage and Mott Foundation grant connected with the Foot Patrol Program, as long as the City maintains a one to one promotional policy, it shall maintain a minimum of eighty two (82) Sergeant positions. In the event said existing millage and/or Mott Foundation grant connected with the Foot Patrol Program are discontinued or reduced, there shall be a corresponding reduction in the minimum number of Sergeants required under this Section 3. For example, if said sources of revenue are reduced by 50%, the 82 minimum shall be reduced by 50% of the number of Sergeants connected with said Foot Patrol Program. The City shall fill vacant Sergeant positions as they occur in order to maintain the eighty two (82) minimum.

Section 4. The amended provisions of this Article shall remain in effect from January 31, 1984, to and including

Appendix H

January 31, 1989, at which time said amended provisions i.e. Section 1, 2, and 3 shall automatically expire on said date unless otherwise agreed, and the former provisions of Article 38 shall be reinstated and the promotional lists shall be combined on the basis of the test scores, said list to remain in effect for the remainder of the 18 month period.

3. Effective retroactive to July 1, 1983, for all hours paid, the 7/1/82 compensation schedule shall be increased by four percent (4%) plus $400. This increase shall be incorporated into the base wage, as shown in the attached Appendix A, page 1. Effective 7/1/84, the compensation schedule placed into effect on 7/1/83 as provided above shall be increased by five percent (5%) plus $400 as shown in the attached schedule; and shall be incorporated in the base wage, as shown in the attached Appendix A, page 2.

4. New article to read as follows:

Effective during the first full non pay week in December of each year, and retroactive to December of 1983, each employee who meets the present mandatory weapons proficiency levels established by the department, and is in the City's employ on the date of payment, will be paid a yearly proficiency allowance of four hundred dollars ($400). Said allowance shall be paid in a lump sum as a separate check (and shall not be considered compensation under the retirement ordinance).

5. The attached letter of understanding on negotiations for the successor collective bargaining agreement shall be sent from the City to the Association.

Appendix H

6. The retroactive pay benefits set forth above shall be paid promptly by the City as soon as possible following ratification of this agreement.

7. The letter of understanding on affirmative action dated 6/27/83 shall be deleted from the contract, along with the second sentence of the first paragraph of Article 14.

/s/ THOMAS BUGBEE

/s/ ALAN DICKENSON

February 23, 1984

Appendix I

TESTIMONY OF MILES WHITE, CHIEF OF POLICE, CITY OF FLINT, MICHIGAN

Appendix I

PRESENTATION OF MILES WHITE, CHIEF OF POLICE, CITY OF FLINT, MICHIGAN

History of Discrimination. In May of 1977 the Federal District Court found the City and the Police Department guilty of unlawful racial discrimination in the employment and promotion of police officers. The decision of the court was not a surprise. Flint, like most American cities, has a long tradition of racial exclusion in its Police Department.

In Exhibit "A", I have reproduced the relative percentages of minority* and non-minority residents of the City of Flint as is reported in the 1970 and 1980 census.

In 1965, there were only 2 black police officers among the approximately 240 uniformed service. In 1957, there were 5. Despite a recognition in the middle 1960's — during the era of civil unrest which engulfed many of our cities — of the need to bring the racial composition of the Flint Police Department into closer conformity with the racial make-up of the City, virtually no effective action was taken. However, the city did recruit at black colleges across the nation. This was an expensive effort and it failed to produce significant numbers of recruits. In 1971, only 10 of 367 (2.7%) uniformed police officers were black. Indeed, prior to 1973, the City had managed to hire only 24 blacks in its entire history.

This longstanding under-utilization of minorities is not a result of an unavailability of interested, qualified, non-white individuals in our Cit Apart from the obvious impact of this tradition on non-white applicants and employees, it has had severe adverse effects on the Police Department's ability to

* As used throughout this presentation the term "minority" refers to individuals identified as black, white Hispanic, American Indian, and Asian.

properly serve all of our citizens. I shall return to this important subject later in this presentation.

That the City's prior failure to hire significant numbers of minority persons as police officers was not accidental is underscored by the experience of the City when the Federal Department of Housing and Urban Development threatened in 1971 to cut off certain funding unless the City reformed its hiring practices. It resulted in an immediate, albeit temporary, jump in the hiring of minority individuals into the uniformed service in the Police Department. I have set forth the hiring statistics for the period 1952 - 1984 below.

Year	Total Hires	Minority Hires	Percent Minority
1952 - 61	170	5	2.9%
1962 - 70	244	8	3.3%
1971 - 72	20	7	35.0%
1972 - 73	29	15	51.7%
1973 - 74	8	2	25.0%
1974 - 75	105	56	53.5%
1975 - 77	0	0	—
1977 - 78	28	5	17.9%
1978 - 79	23	1	4.3%
1979 - 82	0	0	—
1982 - 83	21	11	47.6%

Despite the misgivings expressed by minority high school students on the possibility of getting fair treatment in the Flint Police Department, large numbers of minorities regularly submit applications for employment as police officers. However, fewer minority applicants were appointed compared to non-minority

applicants. In *Alfaro,* the Federal Court summarized our recruitment experience as follows:

> Prior to the EEA recruitment which resulted in the 1973 hirings, the police department had little success in recruiting minority applicants. Plaintiffs' exhibit #26 describes in brief the recruitment efforts in 1960, 1965, 1969, 1970, 1981 and 1973. With the exception of the recruitment in 1973, none of these efforts produced any substantial hiring of Blacks. Various factors were identified through testimony as contributing to the poor results in recruiting from the minority community. The major factors were the lack of distribution of information relating to job openings in the Police Department in the minority community, the low esteem of police officers by Blacks following the rioting in the 1960's; the lack of prospects for promotion of Blacks in the department and the stringent entrance requirements. Most of these difficulties were overcome in the EEA recruitment, by liberalizing the entrance requirements, by the active use of Black police officers in recruiting, and by the wider distribution of information directed toward minority recruitment.

In 1973, in *Holliman,* the court enjoined, as unlawfully discriminatory, use of the entry level examination, requiring college credits or experience as hiring criteria for persons to be hired under federally funded programs. Also, the college credit minimum education requirement in the police department was found to be unlawful in *Alfaro.* The court also noted the standardless discretion exercised by police officers assigned to investigate the background of applicants for police employment. Prior to 1973, all background investigators were white.

Appendix I

The following are the percentage minority applicants and hiring rates for all years for which we have statistics.*

Examination Month/Year	Minorities As Percent of All Accepted Applicants	Test Takers	Minorities As Percent of All Appointments
1/73	52.8%	N/A	60.0%
9/74	61.2%	N/A	57.1%
1/77	61.7%	57.9%	17.9%
7/78	50.4%	47.0%	4.3%
8/82	39.6%	35.1%	47.7%

You may note that the proportion of minority persons appointed approximated the level of minority applications only during the period of active litigation and in the current round of appointments.

The poor performance of the City at the entry level looks impressive when compared to our record in promotions. Prior to September 25, 1974, no minority had ever been promoted above the entry level rank. The promotion selection process operated successfully to exclude minorities. As a result of litigation, five minority officers were promoted on September 25, 1974. Under the provisions of a court settlement signed in November, 1974 the City agreed to award every fifth promotion to sergeant to a minority officer over the next five years or until minority representation in that rank reached 15%. A review of the actual number of police officers promoted subsequent to November, 1974 reveals that the City failed to promote and has never achieved 15% minority representation in the rank of police sergeant.*

* In Exhibit "B", I have set forth these percentages as well as the actual total and minority numbers. See also Exhibit "C".

* But for the making of out-of-sequence promotions pursuant to the litigation, the City's promotional selection procedures would show a consistent pattern of adverse impact against minorities. Details are set forth in Exhibit "C"

Appendix I

PROMOTIONS TO SERGEANT SUBSEQUENT TO NOVEMBER 22, 1974

Examination	Total Promoted	No. Minority Promoted	% Minority
7/73	20	2	10.0%
6/75	18	3	16.7%
6/77	11	3	27.3%
6/79	1	0	0 %
1/83	14	0	0 %

As you can see from the figures I've just presented, minority officers have done less well over the last five years than they had done during the period when the litigation was active. Minorities constitute 19.3% of all officers who took the 1983 examination for promotion to sergeant. They represent 21.2% of those who passed and 0% of those promoted. At the lieutenant level the numbers are not encouraging as is immediately apparent from the following chart.

Lieutenant Promotions 1975 to Present

Exam Year	Tested		Promoted	
	Total	Minority	Total	Minority
1975	54	6	2	0
1980	83	11	6	0
1983	56	9	4	1
	189	26	12	1

Clearly our selection procedures require attention.

Appendix I

As of February 9, 1982, the racial make-up of the Police Department

	Total	Minority	% Minority
Police Officer	230	44	19.1%
Sergeant	74	8	10.8%
Lieutenant	12	1	8.3%
Dep. Chief & Chief	4	0	0

Shortfall Analysis. In order to put all of the above in quantitative terms, I have obtained the assistance of a labor market economist, Dr. Marc Bendick, who has reconstructed the probable racial composition of all ranks within the Police Department as of 1984, assuming that the City had hired and promoted minorities in proportion to their representation in a properly defined labor market. His report is attached hereto as Exhibit "D". Dr. Bendick's study shows that minorities continue to be substantially under-represented in all ranks. I have reproduced Table Three of his report immediately below.

Rank	Expected 1984 Minority Representation	Actual 1984 Minority Representation	Minority Representation Shortfall
Police Officer	39.6%	11.1%	20.4%
Sergeant	31.1%	10.8%	20.3%
Lieutenant	33.3%	8.3%	25.0%
Dep. Chief & above	25.0%	0.0%	25.0%

If we take no action other than to assure that minorities are promoted in relation to their representation in the rank immediately below, it will be a very long time before we approach the percentage representation minority officers should have *today* had the City hired and promoted in a non-discriminatory fashion in the past.

Operational Need. Apart from the need to remedy prior employment discrimination, there is the related and critically important

need to regain the trust and confidence of the minority segment of the population of this City. A direct consequence of the years of exclusion of minorities from our Police Department has been a notable absence of sensitivity and concern for the interests of minority citizens. This lack of sensitivity and concern sometimes has resulted in racially discriminatory conduct by some police officers. The Department's prior slow response to minority citizen complaints of inadequate or unfair treatment by the police has, over the years, resulted in deep distrust and suspicion of the Department on the part of large segments of the minority community. Of course, this problem is not unique in the City of Flint. In 1967, this problem led to five days of rioting in the City of Detroit. Similar tensions were sufficiently high here in Flint that our Department was placed on maximum alert, expecting a racial rebellion. Fortunately, the explosion did not materialize.

While police community relations in Flint have improved substantially since the middle 1960's, there remains that same undercurrent of suspicion and distrust. The affirmative action policy which I urge the Commission to adopt will serve to improve police community relations. It goes without saying that in order for this or any other police department to operate effectively within the community, it needs to have the confidence of its citizens. Our long term failure to more closely reflect the racial make-up of the population we serve has made it impossible for us to establish good police community relations. If all segments of the community see their friends and neighbors represented throughout the rank structure of their Police Department, we will be able to establish the good police community relations that we need. Studies of incidents of police brutality and discrimination by police officers toward minority citizens have shown repeatedly that improving minority representation within the

structure of the Police Department has operated to reduce the number of such incidents and change the perception held by many members in the minority community that brutality and discrimination is the routine or ordinary means of operation of the Police Department. The presence of large numbers of minorities in our Police Department will result in the realization by citizens that they will be treated fairly and it will serve to encourage greater citizen acceptance and cooperation with the department.

Proposal. Because of the lingering effects of prior racial discrimination, the fact that our selection procedures require reform to eliminate adverse racial impact and to achieve greater job-relatedness, and the Department's existing operational need to have a workforce which more closely reflects the population it is duty-bound to serve, I have determined that the City should adopt an affirmative action policy for the Police Department. Accordingly, I am urging that this body review the facts, consider the applicable law, weigh the many considerations that ought to bear on the decision to adopt or not adopt such a policy, and make appropriation recommendations to the Director of Personnel regarding the adoption and implementation of an affirmative action policy. Accompanying my statement is a proposed resolution which sets forth the course of action I have proposed.

Let me now review some additional considerations which I believe bear on the resolution I have proposed.

The End Goal. I have proposed that this committee recommend the adoption of an affirmative action policy which, when implemented, would result in the promotion of minority and non-minority officers on an accelerated 1:1 basis until each supervisory rank, separately considered, is 45% minority. I shall refer to the 1:1 sequence of promotion as an "implementation ratio". The

45% number represents the benchmark at which point the use of an implementation ratio would be discontinued.

The 45% "end-goal" is the figure which should be the focus of our attention. Because the Federal Courts have said in the context of challenges to affirmative action promotion policies that "a goal which seeks the same racial proportion among employees as in the labor force will ordinarily be reasonable" [*Detroit Police Officers Assn* v *Young,* 608 F.2d 671, 696 (6th Cir. 1979)], particular care has been taken to find the proper proportion of minority persons in the labor force from which police officers are drawn. This end-goal was selected because Dr. Bendick's analysis reveals that 44.9% is the appropriate proportion. In addition, I have concluded that a 45% end-goal will further the other important purpose of an affirmative action policy, i.e., the Police Department's operational needs.

Duration of Affirmative Action Policy. I think it is also important to have estimates of the time it is likely to take to achieve 45% minority representation in the supervisory ranks of the Police Department. On this subject, Dr. Bendick's examination reveals the following:

An Estimate of Time When 45% Minority Representation Will Be Achieved With and Without Application of 1:1 Implementation Ratios

Rank	Without Ratio	With 1:1 Ratio	Difference
Sergeant	2001	1992	9 years faster
Lieutenant	2010	1999	11 years faster
Deputy Chief & above	2011	2004	7 years faster

Application of Affirmative Action in Promotional Policy to Female Officers. Let me now address the question of whether or not the affirmative action policy should extend to include female

officers. There are several reasons for the determination to not extend the program in this manner at this time.

First, it is unclear that there is a present need for affirmative action for female officers in our supervisory ranks. The purpose of the plan being proposed today is to remedy the effects of present and past discrimination and to provide for the operational needs of the police department. It is unclear that there exists discrimination against women in the Department's promotional policies or that there is an operational need for more female supervisors which is founded upon a history of prior discrimination and which would call for adoption of strong remedial measures.

Women probably are underrepresented in this Police Department. However, that underrepresentation may not have been the result of prior *unlawful* discrimination. Prior to 1971, women were appointed to the separate classification of "policewoman" and, until 1973, application of a minimum height and weight requirement to all applicants for the classification of police officer operated to disadvantage female applicants. However, these employment conditions were not considered to be *unlawfully* discriminatory until after 1972 when Title VII of the Civil Rights Act of 1964 was amended to cover public sector employment. The policies which operated to exclude minorities has been viewed as unlawfully discriminatory both before and since 1972.

I am not aware of any present practices in the Department which could be construed as unlawfully discriminatory against women. The Department has few female supervisors in uniform positions. It is too soon to assess whether or not our promotional selection procedures operate to disproportionately exclude female officers. We know that our selection procedures for promotion have operated to adversely affect minorities and I doubt seriously that we could show those procedures to be job related.

Second, the serious police community relations problems that have existed between the Department and the minority community simply does not exist among our female residents. Thus, the need to convince the minority community that the era of discrimination has ended simply doesn't exist in regard to female citizens.

Third, the status of women as possible beneficiaries of affirmative action promotions under our collective bargaining agreements is unclear. Certainly, minority women will get a substantial share of the promotions that will be accorded all minorities. We lack facts to determined how white female officers are likely to perform on the written promotional examinations. If it turns out that there is a need to afford additional opportunities to white female officers, we are prepared to discuss that item in further detail with the union involved.

Finally, there is a need to act now to establish an affirmative action policy with respect to minorities. I am advised by the City Attorney that the law does not require us to handle all potential discrimination problems at one time. It is clear that we can and must act to remedy prior discrimination against minorities.

I suspect that female officers have assessed the situation in a manner which is similar to that I have just described. For years minority officers have complained that the City has acted unlawfully to discriminate against them in hiring and promotion. By contrast, we have never received complaints from female officers that they have been unfairly treated in hiring and promotion by the Police Department.* Two complaints that are now before the

* Female officers have filed complaints challenging our prior pregnancy disability policy. Additionally, some women have argued that the classification of "policewoman" should have been upgraded to that of "sergeant" at the time the City reclassified the "detective" classification.

Appendix I

Federal Court do not claim the existence of sex discrimination. They simply assert that the SAAP agreement and now the adoption of an affirmative action policy for minorities would operate to disadvantage our female officers. Because of the possibility that female officers might be burdened by the affirmative action policy we asked Dr. Bendick to analyze the available data and determine how women would be affected if the affirmative action plan is adopted. His analysis reveals that women will be somewhat aided by implementation of the plan. (See Exhibit "D")

Conclusion. The existence of present and prior discrimination in the police department is evident. Our efforts in recent years to correct this condition and its effects have been inadequate. Moreover, continued failure to implement an effective remedy disservices the operational needs of the Police Department. Accordingly, I urge you to adopt the resolution I have proposed. I will be available to respond to any questions the committee might have.

/s/ MILES WHITE

MILES WHITE
POLICE CHIEF

Appendix J

NEED FOR AFFIRMATIVE ACTION IN THE CITY OF FLINT'S POLICE AND FIRE DEPARTMENTS: A REPORT OF PUBLIC HEARINGS HELD ON APRIL 4TH, 10TH, AND 11TH, 1984

I. INTRODUCTION

By the authority of Article V, Section 2-20 of the Flint City Code, the Human Relations Commission conducted hearings on the need for affirmative action in the City's police and fire departments on April 4th, 10th, and llth, 1984. Section 2-20 of the Code of the City of Flint states that "the objectives of the human relations commission shall be to work cooperatively with other persons to eliminate discrimination and the results of past discrimination, to recommend ways and means of initiating and improving city government programs designed to eliminate discrimination or to remove the effects of past discrimination.... To achieve these objectives the human relations commission shall: ... (f) Initiate and conduct hearings not otherwise prohibited by law in situations in which the commission has reason to believe that discrimination has occurred in violation of law."

At its March 1984 regular meeting the Commission authorized the holding of hearings April 4, 10 and 11, 1984 and appointed a hearings panel. The panel was chaired by Olive Beasley, a retired bureau director of the Michigan Department of Civil Rights. Other members included Verell Duncan, First Ward Councilperson — an ex officio member to the Commission as the City Council representative, Affirmative Action Director of Hurley Medical Center and Secretary of the Michigan Association of Affirmative Action Officials (1982-1983); Sam Sanchez, President of the Human Relations Commission; and Victor Goldberg, a local merchant and community activist.

Appendix J

All major local media (radio, TV and newspaper) carried announcements of the hearings. A large number of individuals representing community organizations, concerned citizens, police and fire department employees, police and fire department administration, and city council members testified during the hearings. Such individuals included Melvin McCree, City Council President; Michael McManaman, Ninth Ward Councilperson; Richard Dicks, Deputy Administrator for Public Safety; Miles White, Police Chief; Richard Davidson, Fire Chief; Attorney Preston Oade, representing Teamsters Police Union, Local 129; Attorney Susan Winshall, representing 13 white female officers; Doris Roberts, representing the Afro-American Police League; Vince Lewis, representing the Society of Minority Firefighters; Le Bailey, President of the Flint Association of Black Social Workers; Melvin Brannon, Executive Director of the Urban League; Kenneth Cameron, Chairperson of the Urban Coalition of Greater Flint; Eric Mays of the Flint Branch of the NAACP; Charles Leonard, District Executive of the Flint office of the Michigan Department of Civil Rights; David Solis, Interim Chairperson of the Coalition of Concerned Hispanics; Maria Andriguez, Commission on Spanish Speaking Affairs; Henry Acevido, Labor Council for the Latin American Advancement (LCLAA). Additionally, several persons testified before the Commission as individual residents of the City of Flint and/or as employees of or applicants for employment with the City of Flint.

All persons wishing to speak before the hearing panel were heard; no individual, group or organization was denied an opportunity to speak before the commission.

Appendix J

II. FINDINGS OF FACT

A. FLINT POLICE DEPARTMENT — MINORITY PERSONS

1. The Human Relations Commission has been presented with a substantial amount of oral testimony and written documentation evidencing the existence of unlawful prior discrimination against minority persons in hiring and promotional practices with the Flint Police Department.

2. The Commission has been presented with testimony and written documentation evidencing the existence of on-going unlawful employment discrimination against minority persons in hiring and promotion with the police department.

3. Police Chief Miles White testified before the Commission and presented documentation acknowledging that the police department had engaged in unlawful discrimination against minority persons in its hiring, promotion and assignment policies and practices.

4. Chief White provided the Commission with studies prepared by an expert labor economist on behalf of the police department that show that minority persons would be represented in substantially larger numbers in all ranks within the police department but for prior discrimination. These studies were based on records of Flint's police and personnel departments, U.S. Bureau of Census reports, and labor force availability data from 1950 to date.

5. In *Holliman* v *Price,* Civil Action No. 575, and *Alfaro* v *Suber,* Civil Action No. 613, the United States District Court for the Eastern District of Michigan concluded that the City had engaged in unlawful racial discrimination in hiring and promotion in the Flint Police Department.

6. The Commission has been advised that remedial orders of the Federal Court have not been fully implemented.

7. Because of racially discriminatory conduct by some police personnel toward minority persons, Chief White stated that in addition to the need to remedy prior employment discrimination against minority persons, there is also the related and critically important need to gain the trust and confidence of the minority population of Flint. Such trust and confidence are essential to the operational efficiency of the police department.

8. The police chief advised that in order to achieve operational efficiencies in crime prevention and solution, that the number of minority officers at all ranks should be increased substantially.

9. The Commission has received from the chief of police a written presentation outlining goals and objectives of an affirmative action policy designed to redress the current effects of prior and continuing employment discrimination against minority persons.

10. The Commission has been presented with testimony from Richard Dicks, City of Flint Deputy Administrator for Public Safety, who worked 14 years as a Flint police officer and seven years as a Flint police sergeant between 1957 and 1981. Mr. Dicks provided anecdotal and statistical testimony evidencing employment discrimination in testing, hiring, promotions, assignments, training and disciplinary actions by the police department.

11. The Commission has been presented with testimony from Flint Police Sergeant Authur Evans and Flint Police Officer Doris Roberts, President of the Afro-American Police League of Flint, describing historical and current employment discrimination against minority persons in the police department in hiring, promotions, training and assignments.

12. The Commission has been presented with testimony from Melvin McCree, President of the Flint City Council, advising that the City Council conducted investigations in 1981 and 1983 regarding the need for affirmative action in the police department, as well as other departments. Those investigations concluded that there was a dramatic underrepresentation of minority persons in all ranks of the police department and recommended through a Council committee the adoption of a hiring rate of 65% minority and an affirmative action plan for the accelerated promotion of minority police personnel.

13. Berry Goodlett, President of the Flint Association of Black Administrators, a former chairperson of the Michigan Civil Rights Commission, and currently assistant to the president at Mott Community College testified urging the Commission to increase the number of minority persons in all ranks in the police department in order to enhance police sensitivity to and cooperation from the minority community.

14. The Commission has been presented with testimony from Dr. James Granberry, Ombudsman and Affirmative Action Officer for Flint Community Schools, emphasizing the need for affirmative hiring and promotion of minority persons to ensure compliance with applicable federal and state funding requirements.

15. Several other community leaders, Flint residents and other Flint Police personnel provided the Commission with anecdotal evidence of race discrimination against minority persons by the police department in hiring, promotion and in arrests and detentions, including incidents of police brutality and alleged unwarranted killings of blacks.

16. These community leaders and Flint residents maintained that such discrimination would be greatly reduced by hiring and

promoting more qualified minority persons at all ranks in the police department.

17. These community leaders and Flint residents also felt that if the Flint Police Department was reasonably representative of Flint's workforce at all levels, then there would be more cooperation between the minority community and the police department.

18. Under the affirmative action plan adopted by the City on March 11, 1971, "the City is committed to achieve parity between minority and non-minority group employees."

19. Minority persons have never been represented in the police department's workforce in proportion to their availability in the labor market. The City has never achieved parity at any rank in the police department's sworn personnel.

20. According to 1980 Census data, minority persons represented 46.3% of Flint's total population. Based on a labor force analysis by a consultant to the police department, Dr. Marc Bendick, a labor market economist, minority persons should represent 39.6% of the Flint police officer classification in 1984 which compares to 19.1% actual; 31.1% of the Flint Police Sergeant classification which compares to 10.8% actual; 33.3% of the Lieutenant classification which compares to 8.3% actual; and 25.0% of the Deputy Chief classification which compares to 0% actual. No witness disputed his analysis.

21. The undisputed evidence in the record also shows that the appropriate labor market for the position of police officer in the City of Flint is approximately 45% minority.

22. Police department open competitive and promotional examinations have not been developed and administered pursuant to the federal "Uniform Guidelines on Employee Selection:" (i) no differential validity studies were made with respect to

minority persons, and (ii) no search was made for examinations that would minimize adverse impact against minority persons.

23. Police department open competitive and promotional examinations have been administered where there was insufficient evidence to rule out cultural bias against minority persons or which have not been shown to be predictive of performance on the job.

24. The evidence before the Commission revealed that virtually all such examinations have had an adverse impact on minority persons.

25. Fourteen persons were promoted off of the current eligible list for police sergeant. All fourteen were white including one white female.

26. The current eligible list for police sergeant expires March 23, 1985. Without affirmative action initiatives the next twenty-one persons to be promoted to police sergeant from the current eligible list will be white.

27. The City recently negotiated a collective bargaining agreement which provides that promotions to the rank of police sergeant be made on a 1-to-1 basis: one minority for one white.

28. The chief of police's written presentation to the Commission recommended a 1-to-1 promotional system for all ranks in the police department in order to redress the underutilization of minority persons due to present and prior discrimination.

29. The chief of police testified before the Commission that the proposed 1-to-1 promotional system will foster the achievement of the operational objectives of the police department.

Appendix J

30. Having examined the submission of the chief of police, along with all of the other evidence presented, the Commission finds that the statistical and anecdotal evidence of discrimination against minorities which was presented established a broad pattern of prior discrimination.

31. The Commission concludes that the currently appropriate labor market for police officer in the Flint police department is approximately 45% minority.

32. The Commission finds that 45% is a reasonable end-goal for minority representation in each rank of the classified service of the police department.

33. The Commission finds that the achievement of a 45% minority representation within all ranks in the Flint police department would satisfy the operational efficiencies that are associated with having a police department which more nearly reflects the population that it serves.

34. The Commission finds that reform of the police department's selection procedures is inadequate to remedy the present effects of prior discrimination and to provide for the operational needs of the department.

35. The Commission finds that a job-related, properly validated, and racially neutral promotional system is essential to the proper functioning of the police department.

36. The Commission has been advised by the City Attorney that the adoption of an affirmative action plan for minority persons, including the provision for use of a 1-to-1 promotional ratio until the objectives of the plan are achieved is lawful.

37. The Commission has been advised by the city attorney that the adoption of an affirmative action plan for minority persons which includes implementation ratios that serve to

accelerate the effectuation of remedying the effects of past and present discrimination against minority persons while not unnecessarily trammeling the interests of others is lawful.

38. The Commission finds that implementation of a 1-to-1 promotional ratio until parity is achieved will not unnecessarily trammel the interests of non-minority officers.

39. The Commission finds that the objective of remedying the effects of past and present discrimination against minority persons in a timely fashion requires adoption of implementation ratios which serve to accelerate the effectuation of that remedy.

B. FLINT FIRE DEPARTMENT — MINORITY PERSONS

1. The Human Relations Commission has been presented with facts evidencing the existence of unlawful prior discrimination against minority officers and applicants for employment with the Flint Fire Department.

2. The Commission has been advised of the existence of ongoing unlawful, employment discrimination in hiring and promotions in the fire department.

3. Although legal challenges to alter the fire department's unlawful employment practices against minority applicants and employees never progressed sufficiently to permit judicial inquiry into the substance of plaintiff's claims, the EEOC determined in the case of *Albert McBride, et al* v *City of Flint Fire Department,* EEOC 054-79-009 that the department discriminated against blacks. The City agreed to hire the complainants.

4. The Commission has received from the fire department, through the chief, documents and statistics which indicate that the department has engaged in unlawful discrimination against minorities historically in its hiring and promotional practices.

Appendix J

5. Studies performed by an expert labor economist on behalf of the fire department show convincingly that minorities would be represented in substantially larger numbers in all ranks within the fire department but for prior discrimination.

6. Throughout the entire history of the City of Flint Fire Department, only one minority person — a recently identified American Indian — has even been promoted above the entry level firefighter classification.

7. Prior to 1973, only one Black and no Hispanics had been hired as firefighters.

8. There are currently no minority persons in the classified service above the rank of firefighter. A shortfall analysis compiled by Dr. Marc Bendick revealed minority shortfall of 6.8% at the firefighter level; 23.17% at the fire sergeant level; 15.8% at the fire lieutenant level, and 20.0% at the fire captain level.

9. There are 196 certified firefighting employees in the fire department; 47 are minority persons.

10. The Commission has received from the fire chief a written presentation outlining goals and objectives of an affirmative action policy.

11. The fire chief testified that in order to achieve operational efficiencies in fire prevention and suppression, that the number of minority officers in all ranks should be increased substantially.

12. The Commission has received evidence from the fire chief that the adoption of an affirmative action policy and its implementation is substantially related to the objective of improved fire prevention and fire suppression.

Appendix J

13. Vince Lewis, representative of the Society of Minority Firefighters of Flint, has testified before the Commission that minority firefighters were discriminated against historically by the fire department and continue to be discriminated against in promotions, discipline and treatment.

14. The Commission has been advised that the requirements for promotions to Assistant Training Officer, Training Officer and other positions have not been properly validated.

15. Minority persons have been doubly disadvantaged due to (i) promotional examinations which were not job related and (ii) a practice to award each candidate receiving minimum examination scores one percentage point for each year of employment in the fire department.

16. The Commission finds that the statistical and anecdotal evidence presented to it during the course of the hearings establishes a pattern and practice of prior racial discrimination.

17. The Commission finds that the objective of remedying the effects of past and present discrimination against minority persons in a timely fashion requires the adoption of implementation ratios which serve to accelerate the effectuation of that remedy.

18. The Commission finds that the appropriate labor market for firefighters in the Flint Fire Department is approximately 55 percent minority.

19. The Commission finds that the achievement of minority representation within all ranks in the fire department of at least 55 percent would satisfy the operational efficiencies that are associated with having a fire department which more nearly reflects the population that it serves.

20. The Commission finds that development of a job-related, validated and race neutral promotional system is essential to bar discrimination in the future.

21. The Commission finds that reform of the existing selection procedures within the fire department is inadequate to remedy prior discrimination and provide for the operational needs of the department.

22. The Commission has been advised by the city attorney that the adoption of an affirmative action plan for minority persons in the fire department, including the provision for use of a 1-to-1 promotional ratio until the objectives of the plan are achieved is lawful.

23. The Commission has been advised by the city attorney that the adoption of an affirmative action plan for minority persons which includes implementation ratios that serve to accelerate the effectuation of remedying the effects of past and present discrimination against minority persons, while not unnecessarily trammeling the interests of others is lawful.

24. The Commission finds that implementation of a 1-to-1 ratio until parity is achieved will not unnecessarily trammel the interests of non-minority firefighters.

C. FLINT POLICE DEPARTMENT — FEMALE PERSONS

1. Attorney Susan Winshall appeared before the Commission on behalf of 13 white female Flint police officers who are seeking injunctive relief in U.S. District Court for inclusion of females in affirmative action remedies contained in an agreement between the City of Flint and Teamsters Local 129.

2. Several female officers, black and white, testified before the Commission that they had been discriminated against because of their sex in hiring, promotions and assignments.

3. The Commission has received a report prepared for Attorney Winshall by Dr. Barbara Bergman, a consultant, which showed that females would be represented in larger numbers in all ranks within the police department but for prior discrimination. This report was based on records of the City of Flint's Police and Personnel Departments.

4. Dr. Bergman's report shows that had there not been prior discrimination against females, there would be 58 rather than the actual 34 female police officers; six, rather than the actual two female police sergeants; and a 50 percent chance of one female police lieutenant, rather than the actual none.

5. One female police officer, Francis Miller, is the only female ever promoted from the "police woman" classification to sergeant. Sergeant Miller won her right for admission to the examination process only after prolonged litigation.

6. The other female sergeant was promoted as a result of the high score she achieved on the promotional examination.

7. Both female sergeants are white.

8. Female police officers testified that historically, females were not permitted to apply for "police officer," but were allowed to apply for "police woman."

9. Females were required to have some college while males were only required to be high school graduates.

10. Female police officers testified that they were given discriminatory assignments geographically.

11. Female police officers testified that they were discriminated against in the assignment of types of cases.

12. Females were restricted as to the type of uniform worn on duty.

13. Further evidence of prior discrimination against females in violation of law and regulations of federal funding agencies was revealed to the Human Relations Commission from records of the court decision in Civil Action #607, Consent Decree class action suit, filed by Plaintiffs Autumn Smith, Deborah A. Houston and all others similarly situated: the City of Flint and the police department had violated Plaintiffs rights pursuant to Emergency Employment Act of 1971 and EEOC Guidelines and Equal Protection Clauses of the 14th Amendment. No females had ever been selected as eligible persons in patrolman positions pursuant to funds secured under Omnibus Crime Control and Safe Streets Act of 1968 and general revenues of the City. The police department had exclusionary and discriminatory policies an criteria which disproportionately excluded female applicants. The City received millions of dollars of EEA Act funds during FY's 1971; 72-73; 73-74; 74-75, a portion of which was appropriated and expended for payment of salaries of patrolmen.

14. U.S. District Judge Stewart A. Newblatt ruled in favor of Flint female police sergeant Karen Pizzala on June 15, 1984 that the City of Flint Police Department discriminated against her in denying shift preferences, bonuses and transfer opportunities because of her sex; and that Teamsters Local 214 discriminated against her because of her sex, refusing to process her grievance against the City and police department.

15. Out of a total of 71 promotions from police officer to sergeant between 1972 and to date, two have been females.

16. Out of a total of 23 promotions from sergeant to lieutenant between 1972 and present, none have been females.

17. In 1974, the first year that females were permitted to apply for police officer, 397 of the 859 applicants were female; in 1975, 283 of 876 applicants were females.

18. Police Chief Miles White testified before the Commission that "(i) It is unclear that there is a present need for affirmative action for females in supervisory ranks; (ii) It is unclear there exists discrimination against women in the police department's promotional policies and (iii) There is not an operational need for female supervision which is founded upon history of prior discrimination and which calls for remedial measures."

19. The City of Flint and Teamsters Local 129 have negotiated an affirmative action agreement which calls for one minority police officer to be promoted to sergeant for each white police officer that is promoted to sergeant.

20. The 1-to-1 agreement contains no remedial action for females *per se* or goals for correcting sex imbalances.

21. The assumption appears to be that the 1-to-1 promotion ratio of minority/white will, given the current sergeant eligibility list, include an adequate number of females.

22. At the June 21, 1984 meeting of the Human Relations Commission, a letter dated June 14, 1984 addressed to Police Sergeant Kim Edwards from Larry D. Gregory, Secretary/Treasurer and Principal Executive Officer of Teamsters Local 129, was presented. The letter stated: "The Union's position during the course of negotiations resulting in the current agreement simply embraced the position that ANY Affirmative Action Program must recognize and include *Women*. The City was advised that

the Union would not endorse any Affirmative Action Program that excluded women and accordingly, the City agreed to incorporate language into the Collective Bargaining Agreement which created unilateral responsibility for the implementation of any Affirmative Action Program absent women. The responsibility so created was acknowledged by all parties to be squarely with the City."

D. FLINT FIRE DEPARTMENT — FEMALES

1. There never have been any females in the sworn firefighting positions of the Flint Fire Department.

2. Although there have been some female applicants for entry level firefighting positions, none have been successful in establishing eligibility for appointment.

3. The affirmative action recommendations made by Chief Davidson did not include provisions for the promotion or hiring of females.

E. MINORITIES OTHER THAN BLACKS

1. Federal and state laws and affirmative action guidelines to which the City of Flint is subject define minorities as black, Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native.

2. 1980 Census Data shows that 2.5% of Flint's total population is Hispanic.

3. Henry Acevido, representing the Labor Council for Latin American Advancement; Maria Andriguez, Commission on Spanish Speaking Affairs; and David Solis, Interim Chairperson of the Coalition of Concerned Hispanics, all expressed bitter

resentment at the underutilization of Hispanics in the police and fire departments.

4. There is presently one Hispanic in the police department and three Hispanics in the fire department.

5. According to a survey conducted by the Genesee Valley Indian Association, there are 1,692 American Indians, 1,015 of whom are of working age in the Flint labor market.

6. 1980 Census data shows 972 American Indians and Alaskan Natives in Flint corporate city limits.

7. 1980 Census data shows 356 Asians.

F. OTHER FINDINGS

1. A report issued by the Michigan State Advisory Committee of the U.S. Civil Rights Commission entitled "Affirmative Action in 10 Michigan Cities" showed that Flint had the lowest ranking in utilizing minorities among 10 major cities surveyed.

2. During March/April 1983, the Flint City Council conducted public hearings on implementation of the City's affirmative action plan. Testimony by city administrators and others revealed that the affirmative action plan adopted by the City in 1971 had received little attention at top levels of administration and had been allowed to languish during the period from 1975 to 1981.

3. An investigation conducted by Flint Civil Service Commission during 1983 on complaints filed by a group of black firefighters revealed disparities in disciplinary action between minority and non-minority employees with minorities receiving harsher and more frequent discipline plus other discriminatory practices in regard to hiring, promotions and testing procedures.

Appendix J

4. A task force on affirmative action in the police department was appointed in 1983 and submitted its report and recommendations in October 1983. The recommendations were:

a) That promotions from rank of police officer to sergeant should be made on a 1-to-1 basis until 30% of all sergeants are minority and 20% of all sergeants are female.

b) No minority or female police officer should be laid off if such layoff would result in minority utilization of less than 30% of all sergeants or a female utilization of less than 20% of all sergeants.

c) Employee development classes should be scheduled on a regular basis designed to improve performance as police officers and to enhance performance on the examination for sergeant. Classes should provide information as to what to expect on written exams and who is considered as text book authorities.

d) Use commercial *Examinators*. Only Personnel Department staff should be aware of which questions will appear on an exam.

e) Eliminate culturally/sexually biased tests.

f) Establish a library so all officers competing in exams will have an opportunity to study.

5. The Flint Human Relations commends to the attention of the City Administration that there are compelling legal, moral, and self interest reasons for adoption and sustained implementation of a comprehensive affirmative action plan: 1) Legal Obligations are prescribed by federal and state laws and regulations of funding sources on which the City must rely to provide services. The City must implement Court orders.

Appendix J

Legal obligations of the City of Flint by virtue of Federal Laws and Regulations of Federal and State Funding Sources.

Title VII Civil Rights Act of 1964 (as amended by Equal Opportunity Act of 1972)

Executive Order 11246 (as amended by Executive Order 11375)

Revised Order #4 Equal Pay Act 1963

Age Discrimination in Employment Act of 1967.

Title VI Civil Rights Act of 1964.

Michigan Elliot-Larson Civil Rights Act #P.A. 453 and Handicappers Act #P.A. 220. Governors Executive Directive #51.

National Labor Relations Act and Related Laws.

Civil Rights Acts of 1866 and 1870 and Equal Protection Clause of 14th Amendment to U.S. Constitution.

Regulations, HUD; GRS; EDA; EEOC; OFCC.

2) The City has a moral obligation to avoid appropriations and expenditures of taxpayers money in ways that disadvantage segments of the population.

3) The City has compelling reasons of self interest to reduce unemployment in order to maximize the generation of additional revenues from gainfully employed residents. The late Eric Johnston, while serving as president of the U.S. Chamber of Commerce, stated, "Discrimination in employment is a fool's economy."

Appendix J

III. CONCLUSION

Clearly, convincing evidence was presented to the Human Relations Commission through written and oral testimony and relevant documentation showing, and the Commission has concluded that the Flint Fire and Police Departments have historical and current records of unlawful discriminatory and exclusionary policies, practices and criteria that have adversely impacted and continue to adversely impact minorities and females in hiring and promotion.

Such unlawful policies, practices, and criteria have resulted in an underrepresentation of minority and female persons in all ranks of the police and fire department's sworn personnel.

The achievement of an end-goal to eliminate these race/sex imbalances within a reasonable frame of time at all rank levels requires the expeditious adoption and implementation by the City of Flint of a comprehensive affirmative action plan with specific goals and time tables.

The Human Relations Commission is aware that some initiatives have been taken by the Personnel Department including improvement in validation of exams; modifications of certification procedure; dissemination of information regarding employment opportunities to protected classes; pre-employment inquiries in compliance with state and federal laws; and in-service training and retraining programs for all personnel. These initiatives should be refined and strengthened. However, it is clear from the record that these initiatives have not sufficed to eliminate race/sex imbalances in the work force.

We further call attention to the possibility that unless these imbalances are corrected, the City of Flint way be in jeopardy of disqualification for HUD grants. The City of Grand Rapids was so disqualified in 1983. The City of Flint currently receives

millions of dollars from HUD and many of its continued and future projects are dependent on HUD funds.

The Human Relations Commission recognizes and concurs and federal guidelines recommend that unions have a legitimate interest in promotional policies and unions should be included in the development of affirmative action plans that would affect their membership at levels above entry ranks. The City is solely responsible for hiring policies at entry levels.

We remind the City, however, of the March 4, 1980 "Memorandum Opinion and Recommendation" of U.S. Magistrate Harvey D. Walker in the case of *Waldron, et al* v *Flint Police Patrolmen's Association et al* in which he cites the following quote from *Baker* v *City of Detroit,* Civil Action No. 5-71937, in the United States District Court for the Eastern District of Michigan: "In any event, this Court can see no reason why an affirmative action plan should rise or fall on whether a union agrees to it."

The Commission has concluded that the objective of remedying the effects of past and present discrimination against minority and female persons in a timely fashion requires adoption of implementation ratios which serve to accelerate the effectuation of that remedy.

The Commission concurs with Dr. Bendick in his June 25, 1984 letter to the City Attorney "that a 1-to-1 implementation ratio based on race would tend *de facto* to promote females to sergeant...[based on the current eligible list]." However, the Commission is acutely concerned about the makeup of future lists. Should such a promotion system fail to redress female imbalances within a reasonable time schedule, then appropriate adjustments should be made.

Appendix J

IV. RECOMMENDATIONS

1. The Flint Human Relations Commission recommends that a comprehensive affirmative action plan be developed by the Personnel Department expeditiously and implemented on a sustained basis until parity is achieved at all rank levels in police and fire departments for minorities (Blacks, Hispanic, American Indians) and females. Immediate attention should be given to the extension of the affirmative action plan to all other city departments where there is under-representation of minorities and females.

2. We further recommend that a comprehensive affirmative action plan include the following components:

- Development of a profile of work force analyzed by the number of minorities and females in each job classification.

- Survey labor market area in terms of population make up, skills present, and availability for employment.

- Ascertain number of minorities and females possessing necessary skills and training who are available to work.

- Establish Quantitative and Qualitative Utilization Goals and Timetables. Qualitative goals represent number of employees in management, administrative supervisory assignments and classifications.

- Dissemination of affirmative action policy:

(i) Letter or memo from Mayor and Personnel Director to every employee describing policy.

ii) Bulletin Board display of policy and/or summary. City Hall Lobby, conspicuous location in

Personnel Department and all city department offices; department employees and labor union bulletin boards.

(iii) Description of policy in all supervisors handbooks, employee handbooks, collective bargaining agreements. External Dissemination — Local media including minority media, labor union newspapers, civil rights organizations, minority organizations, womens' organizations, key civic leaders, MESC Recruitment sources, local, state, national; all job applicants.

• Appointment of permanent EO/AA Director/Manager at peer level with Personnel Director and with full authority to implement program, and with authority to review all hires and promotions selection of applicants prior to offer of employment by a departmental appointing authority.

• Where rule of three/five or greater number exists, department appointing authority shall interview all applicants within certifiable range.

• All employment and promotional tests must be validated for job relatedness, reliability, predictability of satisfactory performance, and elimination of cultural/sex bias including physical agility test — especially those that have an adverse impact on females.

• Recruitment for open competitive exams should be widely disseminated to community resources most likely to assist in generating minority/female applicants, (example — women's organizations, organizations primarily serving minority constituents — blacks, Hispanics, American Indians, Asian and Pacific Islanders, and Alaskan Natives).

Appendix J

Some of the items referred to have already been prepared and have been presented to the Commission in connection with the presentations of Chiefs White and Davidson.

3. The Human Relations Commission further suggests that consideration be given to substitution of Assessment Center method of promotional exams in place of traditional written/oral exams.

4. A contract compliance component should be included as integral part of affirmative action plan to assure that all contractors, vendors and suppliers of goods and services including technical and professional services afford equal employment opportunities to minorities and females.

5. While seniority clauses in collective bargaining agreements must be respected, the Human Relations Commission recommends that whenever reductions in work force are necessary, alternative measures be first considered to prevent reductions in utilization of minorities and females. Such measures are used in other civil service jurisdictions and can prevent any layoffs of non-minorities as well as adverse impact on minorities and females with low seniority.

6. The Human Relations Commission does not concur that the 1-to-1 ratio of minorities to non-minorities proposed by fire and police chiefs will achieve the end-goal of 45% in the police department and 55% in the fire department by 1992. The proposed 1-to-1 system requires expanded certification so that the highest ranking minority would be certified for each non-minority that is certified. The proposal is flawed due to other factors that the Human Relations Commission has analyzed during its review of testimony at the April hearings and other documentary evidence. The proposed 1-to-1 ratios apply only to minorities and exclude females which the records clearly establish have been

subjected to historical discriminatory treatment. Of the first eight promotions to be made under the proposed 1-to-1 system for police sergeant, at least two will be females. We understand these promotions are imminent. The next 14 eligibles on the list include five females and one Indian under the proposed 1-to-1 system. The list is effective through March 1985. This will provide some redress to the underutilization of females but does not ensure sustained progress in eliminating such underutilization within a reasonable period of time. Furthermore, the proposal does not address the rate at which vacancies will occur to provide opportunity to apply the 1-to-1 ratios. Unless budgetary conditions allow increases in number of employees above entry level ranks or normal attrition rates provide an adequate number of vacancies, the end-goals will not be achieved by 1992 or even by 2011. A further deterrent to a steady rate of promotions is the requirement in both police and fire departments for length of time in lower grades to be eligible for admission to examinations for the next highest level. It is our understanding that many incumbents who are eligible for retirement after 23 years of service do not retire, particularly in the police department. Further, the City has no mandatory retirement age. Also, of those who file for retirement during any given year, there appears to be no reliable predictor of the number who will *actually* retire. There is evidence that some of those who file for retirement rescind their retirement application before the effective date of the retirement.

The Human Relations Commission, therefore, recommends that a more reliable method of achieving diversity in the work force by 1992 would be to:

a. Conduct an annual review by the Personnel Department of current demographic data to ascertain changes in number of protected classes — minorities (including Hispanics, Indians and Asians) and females — available for

employment in the labor market possessing the necessary skills and training for entry employment and adjust hiring rates and goals accordingly.

b. Conduct an annual review by the Personnel Department of the lower level employees' education and training that enhance their qualifications for higher ranks in the police and fire departments; determine the extent of underutilization of blacks, Hispanics, Indians, Asians and females; and annually adjust promotion rates so as to ensure the full utilization of blacks, Hispanics, Indians, Asians and females by 1992. Such adjustments may require promoting minority and female employees at rates greater than the proposed 1-to-1 system. The Human Relations Commission recommends that unranked eligible lists be used to facilitate such adjustments.

Finally, the Human Relations Commission recommends that in order to avoid further delay in redressing imbalances in the workforce, that the proposed 1-to-1 promotion of minorities to whites be implemented immediately with the understanding that annual reviews will be made to determine the need for appropriate adjustments and with the further understanding that minority females will be promoted from the minority list and white females will be promoted from the non-minority list.

Appendix K

EXHIBIT "D"

MINORITY HIRING AND PROMOTION IN THE FLINT POLICE DEPARTMENT: A LABOR MARKET ANALYSIS

Marc Bendick, Jr., Ph.D.
April 1984

BENDICK AND EGAN ECONOMIC CONSULTANTS
4201 MASSACHUSETTS AVE, N.W.
WASHINGTON, D.C. 20016
(202) 686-0245

Appendix K

I. INTRODUCTION

This report provides an analysis of the representation of minorities in the sworn officer ranks of the Flint, Michigan police department. Specifically, it provides answers to four questions:

1. What proportion of the labor pool for entry-level positions in the department is minority as of today (1984)?

2. To what extent are minorities underrepresented in the supervisory ranks of the department (sergeant, lieutenant, deputy chief and above), compared to what their representation would be if past hiring and promotion had been conducted with no adverse impact on minorities?

3. How long would it take for minorities to achieve proportional representation in the supervisory ranks of the department under each of two alternative promotional systems carried out from 1984 forward: one embodying a 1:1 promotional ratio for minorities and one operating in a "race-neutral" manner?

4. What would be the representation of women in each supervisory rank when minorities achieve proportional representation under each of the two alternative promotional systems?

This report was prepared at the request of the city of Flint. Its findings are derived from official published statistics of the U.S. Bureau of the Census and from data provided by the city personnel and police departments. The analysis presented represents the conclusion of an expert labor economist who is not a resident of the Flint area and who has no personal interests in the personnel practices of the city of Flint.

Appendix K

II. MINORITY REPRESENTATION IN THE POLICE DEPARTMENT'S ENTRY-LEVEL LABOR POOL, 1984

The first question addressed in the analysis is: what proportion of the pool of potential applicants for entry-level sworn officer positions[1] in the police department do minorities represent, as of 1984? This information provides an important baseline for understanding patterns of minority hiring, past and present.

Table one presents three alternative estimates of this number, each derived a different way:

- The first estimate is the average minority proportion of applications for entry-level jobs received when the department has posted openings during the last decade (1973-1983).
- The second estimate is the proportion of all residents of the city of Flint who are minority as officially estimated in the 1980 U.S. Census.
- The third estimate was calculated from data provided by the 1980 Census but with adjustments made to tailor it to the pool of persons who are both eligible for and most likely to apply for police officer jobs. It considers only persons in the relevant age range (18-34), educational range (high school graduates), and labor force status (employed or expressing interest in being employed). It reflects the fact that hiring occurs from outside the city itself (70% from the city, 20% from the remainder of the county, and 10% from the remainder of the state). It also adjusts for

[1] In different years, the entry-level position in the department has been labeled police officer, patrolman, police officer recruit, or police officer trainee. This report merges all these categories and refers to them collectively as police officers.

technical flaws in the Census in its ability accurately to count the number of minorities in a community (the "Census Undercount") and for the propensity of minorities to apply for civil service jobs at a somewhat higher rate then for jobs in the private business sector.

TABLE ONE

THREE ESTIMATES OF THE MINORITY PROPORTION OF THE LABOR POOL FOR ENTRY-LEVEL SWORN POSITIONS IN THE FLINT POLICE DEPARTMENT, 1984

Basis for Estimate	Estimate
Average minority proportion of applications received when the department has posted openings, 1973-1983.	53.1%
Minority proportion of all residents of the city of Flint, according to the 1980 U.S. Census	44.9%
Estimate calculated from 1980 Census adjusted to reflect Census undercount, as well as the population's age, educational level, labor force status, place of residency, and propensity to apply for civil service jobs.	45.0%*

* Author's preferred estimate.

In the judgment of the author of the report, the last of these three estimates is the most accurate one. The adjustments embodied in it make it reflective of a police department labor pool rather than the general population (which the second estimate represents). And the first estimate, based on actual applications received, is

probably high due to the city's affirmative action/positive recruitment efforts.

If view of the foregoing, the author concludes that *the minority proportion of the labor pool for entry-level police jobs in Flint in 1984 is approximately 45 percent.*[2]

III. MINORITY UNDERREPRESENTATION IN THE SUPERVISORY RANKS OF THE DEPARTMENT, 1984

The minority proportion of the department's entry-level labor pool just estimated — 45 percent — represents a reasonable standard for what proportional representation would be among new hires to the department today.[3] But officers currently occupying the advanced ranks of the department were hired between eight and thirty years ago; and even most members of the entry rank of police officer were hired in 1978 or earlier. In these earlier years, the minority representation in Flint's population was less than it is today. Therefore, even if hiring and promotion throughout the department's history had imposed no adverse impact on minorities, minorities would still account for less than 45 percent of all the ranks of the department. The more advanced the rank, the longer ago the average occupant of the rank was hired, and therefore the lower would be proportional minority representation.

---

[2] In this estimate, and throughout this report, minorities are defined as persons of both sexes who belong to any racial or ethnic group other than white non-Hispanics. In the city of Flint, according to the 1980 Census, blacks account for about 93 percent of all minorities; the remainder consist of white Hispanics (about two percent of minorities); American Indians (two percent); Asians, Pacific Islanders, and Eskimos (one percent); and persons of mixed or unclassifiable background (two percent).

[3] In the most recent instance of entry-level hiring in the department — that of 21 officers in 1982/83 — 10 (or 47 percent) were minority.

Appendix K

The purpose of this section of the report is to estimate what proportional minority representation at each rank of the department should be in 1984, taking account of this complication. To do so, it first provides an estimate of the minority proportion of the department's entry-level labor pool for each year between 1984 and 1950. These estimates are set forth in table two and are derived from U.S. Census data using the same methods as in the preferred estimate set forth in table one.[4] As the table indicates, minorities represented about twenty percent of the labor pool even as recently as 1960, with very rapid growth occurring during the 1960s.

[4] The data and methods utilized in deriving these estimates are documented in a separate report entitled "Minority Hiring and Promotion in the Flint Police Department: Additional Data Tables."

Appendix K

TABLE TWO

MINORITIES AS A PROPORTION OF THE LABOR POOL FOR ENTRY-LEVEL SWORN POSITIONS IN THE FLINT POLICE DEPARTMENT, 1950-1984

Year	Minority Proportion	Year	Minority Proportion
1984	45.0%	1964	27.5
1983	44.9	1963	24.5
1982[2]	44.8	1962	21.7
1981	44.7	1961	18.8
1980[1]	44.6	1960[1]	15.6
1979	44.5	1959	14.4
1978[2, 3]	44.5	1958	13.3
1977[2, 3]	44.5	1957	12.2
1976[3]	44.5	1956	11.1
1975[3]	44.5	1955	10.0
1974[2, 3]	44.5	1954	8.9
1973[2, 3]	44.5	1953	7.8
1972	44.5	1952	6.7
1971	44.5	1951	5.6
1970[1]	44.5	1950[1]	4.5
1969	42.0		
1968	39.1		
1967	36.2		
1966	33.3		
1965	30.4		

[1] Census year; estimate is calculated from Census data using methodology described in text. Other years' estimates were created by linear interpretation or extrapolation from Census years.

[2] In these years, these estimates can be compared to the proportion of minority applications actually received when the department was hiring at the entry level. These comparisons show that actual applications averaged 5.3 percent

higher than the estimates provided here, indicating that these estimates are conservative and that minority representation in the entry-level labor pool is at least as high as stated in this table.

[3] During the years 1973-1978, officers were hired under federal Emergency Employment Act (EEA) and Comprehensive Employment and Training Act (CETA) funds. City officials estimate that minorities accounted for between 40 percent and 60 percent of persons eligible for these programs in Flint. Thus, the estimates in this table are consistent with — and more conservative than — city estimates for these years.

Table three then applies the data in table two to derive estimates of minority proportionate representation, as of 1984, in each of four ranks in the police department. It indicates that in 1984, minorities would proportionately be expected to constitute 25 percent of the rank of deputy chief and above; 33 percent of the rank of lieutenant; 31 percent of the rank of sergeant; and 40 percent of the rank of police officer. The table also indicates that actual minority representation in 1984 falls substantially short of these levels:[5]

- *For the rank of police officer, proportionate minority representation as of 1984 would be 91 out of 230 total officers. Their actual representation of 44 falls 47 short (20.4 percent of all officers).*
- *For the rank of sergeant, proportionate minority representation as of 1984 would be 23 out of 74 total sergeants. Their actual representation of 8 falls 15 short (20.3 percent of all sergeants).*

[5] Standard statistical tests indicate that these differences are significantly different from zero and cannot reasonably be attributed to chance variation alone. At the rank of the police officer, the probability that the observed differences are due to chance alone is less than 1 in 10,000; at the rank of sergeant, it is less than one in 1,000; at the rank of lieutenant, it is less than 5 in 100; and at rank of deputy chief and above, it is less than 1 in 10.

Appendix K

- *For the rank of lieutenant, proportionate minority representation as of 1984 would be 4 out of 12 total lieutenants. Their actual representation of 1 falls 3 short (25.0 percent of all lieutenants).*
- *For the rank of deputy chief and above, proportionate minority representation as of 1984 would be 1 out of 4 total at these ranks. Their actual representation of none falls one short (25.0 percent of all positions at these ranks).*

Appendix K

TABLE THREE

MINORITY REPRESENTATION AT VARIOUS RANKS IN THE FLINT POLICE DEPARTMENT, 1984, COMPARED TO THE REPRESENTATION WHICH WOULD BE PRESENT IF PAST HIRING AND PROMOTION WERE CONDUCTED IN A "RACE FREE" MANNER*

Rank	Number on Force, 1984*	Estimated Minority Representation in the Absence of Past Adverse Impact on Minorities		Actual Minority Representation		Minority Shortfall of Proportionate Representation	
		Number	Percent	Number	Percent	Number	Percent
Officer	230	91	39.6%	44	19.1%	47	20.4%
Sergeant	74	23	31.1%	8	10.8%	15	20.3%
Lieutenant ...	12	4	33.3%	1	8.3%	3	25.0%
Deputy Chief and above...	4	1	25.0%	0	0.0%	1	25.0%

* "Race-free" is defined as minorities being hired or promoted into each rank in proportion to their expected representation in the relevant hiring or promotional pool.

In interpreting these estimates, it should be kept in mind that when these shortfalls are erased, then minorities will still have achieved representation in the department proportionate only to their *1984* expected representation in the department. The next section of this report will make clear that, even with the aid of promotional ratios, such erasure will take a number of years — years during which the average date of hire of officers in supervisory ranks will advance further into years in which minorities constitute a major proportion of the Flint area labor pool. Therefore, by the time these levels of representation are achieved,

the levels themselves will be obsolete "end goals." *The appropriate end goal for proportionate minority representation at all ranks in the police department is the 45 percent which minorities constitute of the entry-level labor pool for the department.*[6]

IV. THE EFFECT OF A RACE-CONSCIOUS PROMOTIONAL SYSTEM ON THE RATE AT WHICH THESE SHORTFALLS CAN BE ELIMINATED

Suppose that no promotional ratios were implemented in the police department but rather that, from 1984 onward, promotions simply proceed with no adverse impacts on minorities (that is, with minorities, on average, being promoted to a rank in proportion to their then-current representation at the next lower down rank). Then the shortfalls estimated in table three would eventually disappear. The author of this report has estimated how fast minority representation at the supervisory ranks would achieve the 45 percent end goal level.[7] The results of those estimates are presented in the first column of table four. The table indicates that minority shortfalls in the advanced ranks of the department would be eliminated at different times between the years of 2001 and 2011. Full minority representation everywhere in the department would be achieved by the latter date, 27 years from 1984.

The second column of table four provides estimates of the date of erasure of the minority shortfall under an alternative promotional scheme — one utilizing a 1:1 promotion ratio for minorities for all supervisory ranks. It shows that elimination of

[6] If the minority population of the city of Flint continues to grow from 1984 onward, as it has in the past, than the 45 percent figure itself could properly be adjusted upward as well.

[7] In these estimates, the author used historical averages for the retirement rates of officers at various ranks, rather that specific information on the retirement plans of individual members of the department.

minority underrepresentation would occur at various ranks between the years 1992 and 2004, with the last vestiges gone 20 years after 1984.

The final column of the table directly compares the rate of elimination of shortfalls at each rank under the two alternative promotional rules. This comparison indicates that *at each of the supervisory ranks, the time required to eliminate minority underrepresentation is reduced by between 7 and 11 years by utilization of a 1:1 minority promotional ratio.* Thus, *a promotional system utilizing a 1:1 promotional ratio for minorities would substantially increases the rate of elimination of minority underrepresentation in the supervisory ranks of the Flint police department.* A process which otherwise would take 27 years can be accelerated to one requiring 20 years.

Appendix K

TABLE FOUR

THE EFFECT OF TWO ALTERNATIVE PROMOTIONAL SYSTEMS ON THE YEAR IN WHICH MINORITIES ACHIEVE A 45 PERCENT LEVEL OF REPRESENTATION IN EACH SUPERVISORY RANK, FLINT POLICE DEPARTMENT

Rank	Year in which Minorities Achieve a 45 Percent level		
	Under a "Race-Neutral System*	Under a 1:1 Promotional Ratio for Minorities	Difference under the Promotional Ratio System
Deputy chief and above.....	2001	1992	9 years faster
Lieutenant	2010	1999	11 years faster
Sergeant	2011	2004	7 years faster

* "Race-neutral" means that, on average, minorities are promoted into each rank in proportion to their then-current representation in the next-lower rank.

V. THE EFFECTS OF A RACE-CONSCIOUS PROMOTIONAL SYSTEM ON PROMOTIONAL OPPORTUNITIES FOR WOMEN

The promotional system whose effects were examined in the previous section of this report is one in which no explicit attention is paid to the sex of employees. Minority women would, on average, be promoted in proportion to their representation among all minorities, while the same would hold true for non-minority women among all non-minorities. As of 1984, there are 41 women among the 321 sworn officers in the police department (17 percent of police officers, three percent of sergeants, and zero percent of lieutenants, deputy chiefs, and above).

Appendix K

The author of this report analyzed whether women as a group would be adversely affected in their promotional opportunities by a system of 1:1 promotional ratios for minorities, compared to a "race-neutral" promotional system. This analysis was performed by calculating the representation of women in the supervisory ranks of the department under each of the two systems in the year 2011, the year in which minorities would achieve proportional representation under the slower of the promotional systems. The results of this analysis are presented in table five.

TABLE FIVE

THE EFFECT OF TWO ALTERNATIVE PROMOTIONAL SYSTEMS FOR MINORITIES ON THE REPRESENTATION OF WOMEN IN SUPERVISORY RANKS IN THE YEAR 2011, FLINT POLICE DEPARTMENT

	Proportion of the Rank Occupied by Women		
Rank	Under a "Race-Neutral" System*	Under a 1:1 Promotional Ratio for Minorities	Difference under the Promotional Ratio System
Deputy chief and above . .	1	2	+1
Lieutenant	2	5	+3
Sergeant	31	27	−4
All Supervisory ranks . . .	34	34	0

* "Race-neutral" means that, on average, minorities are promoted into each rank in proportion to their then-current representation in the next-lower rank.

Appendix K

The table indicates that, under either system, women would account for 34 supervisory officers within the department in the year 2011. Under the promotional ratio system, they would occupy a slightly higher average rank than under the race neutral system, with 2 officers at the deputy chief and above level rather than 1 and five lieutenants rather than 2. The total number of officers at these ranks is so small that statistical tests indicate that these differences could arise by chance about one time in three. It appears therefore that, *within the accuracy of these calculations, there is essentially no difference in the rate of promotional advancement for women under a 1:1 minority ratio promotional system as opposed to a race-neutral system.* If there is a slight difference, then women are slightly better off under the minority promotional ratio system.

Appendix L

THE REPRESENTATION OF MINORITIES AT THE RANK OF SERGEANT IN THE FLINT POLICE DEPARTMENT: AN UPDATED LABOR MARKET ANALYSIS

Marc Bendick, Jr., Ph.D.

February 1992

BENDICK AND EGAN ECONOMIC CONSULTANTS, INC.
3760 39TH STREET, N.W.
WASHINGTON, D.C. 20016
(202) 686-0245

Appendix L

I. INTRODUCTION

This report provides an analysis of the representation of minorities at the rank of sergeant in the Flint, Michigan Police Department. Specifically, it provides answers to the following questions:

1. What proportion of the labor pool for entry-level hiring in the Department was minority in the years during which persons who are sergeants in 1992 were initially hired (Section II of this report)?

2. To what extent are minorities under-represented at the rank of sergeant as of the present, compared to what their representation would be if hiring and promotion had always been conducted with no adverse impact on minorities (Section III of this report)?

3. To what extent would minorities be under-represented at the rank of sergeant after promotions to bring the complement of sergeants to 83, where those promotions reflected a 1:1 promotional ratio of minorities and non-minorities (Section IV of this report)?

4. Is it appropriate to use minority representation at the rank of police officer as a yardstick against which to judge minority representation at the rank of sergeant (Section V of this report)?

5. How does under-representation of minorities at the rank of sergeant affect the operational efficiency and effectiveness of the Department (Section VI of this report)?

This report was prepared at the request of the city of Flint. Its findings are based on official published statistics of the U.S. Bureau of the Census and data provided by the city's Personnel and Police Departments. All calculations utilize well-established

techniques of analysis,[1] and the report represents the conclusions of an expert labor economist who is not a resident of the Flint area and who has no personal interests in the personnel practices of the city of Flint.

II. MINORITY REPRESENTATION IN THE POLICE DEPARTMENT'S ENTRY-LEVEL LABOR POOL 1950-1992

The first question addressed in this analysis is: what proportion of the pool of potential applicants for entry-level sworn officer positions[2] in the Police Department did minorities[3]

[1] The same techniques have been applied to other police departments around the country and, in that context, accepted by federal courts as appropriate expert analysis. See the testimony of Marc Bendick, Jr., in *Williams v. New Orleans* 543 *F. Supp.* 62 (E.D. La. 1982), the testimony of Marc Bendick, Jr. in *N.A.A.C.P. v. Detroit* 519 *F. Supp.* 1194 (E.D. Mich. 1984), and the testimony of Alan Fechter in *Baker v. City of Detroit* 483 *F. Supp.* 930 (E.D. Mich. 1979). They were also been applied by the present author to other police departments in the state of Michigan, including those in Pontiac and Southfield, where they have been utilized in Act 312 arbitrations and/or reviewed and accepted by the Michigan Civil Rights Commission. Finally, they have been applied by the present author to the Flint Police Department in reports in 1984, 1988, and 1990 (see footnote 4, below), as well as the Flint Fire Department in 1984.

[2] In different years, entry-level positions in the Department have carried varied labels including police officer, police women, patrolman, police officer recruit, and police officer trainee. This report merges all these categories and refers to them collectively as police officers.

[3] In this analysis, minorities are defined as persons of both sexes belonging to any race or ethnic group other than white non-Hispanics. In data from the 1990 Census, this definition corresponds to following categories: black; American Indian, Eskimo, and Aleut; Asian and Pacific Islander; Hispanic; and persons not elsewhere classified. In recent personnel records of the city of Flint, this corresponds to the following categories: black, Hispanic, American Indian, and Asian. In the city of Flint as of the 1980 and 1990 Censuses, blacks accounted for approximately 93 percent of all minorities. In the 1990 Census, the remainder consist of Hispanics (about six percent of minorities), American

represent during the years when persons who are currently sergeants were initially hired as police officers? Following procedures outlined in my previous reports concerning the Flint Police Department,[4] I have derived the estimates set forth in Table One. These estimates were calculated from data provided by the 1960, 1970, and 1980 Censuses[5] with adjustments to tailor it to the pool of persons who are both eligible for and likely to apply for police jobs. Specifically, as these earlier reports discuss,[6] the estimates considers only persons in the relevant age range (18-34), educational range (high school graduates), and labor force status (employed or actively seeking employment). They reflect the fact that hiring occurred from outside the city itself (using weights of 70 percent from the city, 20 percent from the remainder of Genesee County, and 10 percent from the remainder of the state). They also adjust for technical flaws in the accuracy of the Census (the "Census undercount") and for the propensity

---

Indians (about one percent), Asians, Pacific Islanders, and Eskimos (about one percent), and persons of mixed or unclassifiable backgrounds (much less than one percent).

[4] In chronological order, these earlier reports are: *Minority Hiring and Promotion in the Flint Police Department: A Labor Market Analysis* (April 1984); *Minority Hiring and Promotion in the Flint Police Department: Additional Data Tables* (April 1984); *Minority Hiring and Promotion in the Flint Police Department: A Labor Market Analysis* (October 1988); *The Representation of Minorities at the Rank of Sergeant in the Flint Police Department: A Labor Market Analysis* (April 1990); and *The Representation of Blacks at the Rank of Sergeant in the Flint Police Department* (April 1990).

[5] Eventually, the 1990 Census can be used to extend and refine these estimates. However, the detailed Census data required to do so were not yet available at the time this report was prepared. It is likely that updated estimates would differ only slightly from those presented here.

[6] Appendix I to the present report reproduces (with slight modifications) Appendix I to my April 1990 report on minorities, which documents the data and computational procedures utilized in deriving these estimates.

of minorities to apply for civil service jobs at a higher rate than for jobs in the private sector.

Table One indicates that minority representation in the labor pool for entry-level hiring into the Flint Police Department stood at 21.7 percent in the earliest year examined, 1962. It has subsequently risen to 45.8 percent in 1992, an average annual rate of increase of approximately three-quarters of a percentage point.

In the next section of this report, the estimates in Table One will form the basis for estimating minority under-representation at the rank of sergeant.

Appendix L

TABLE ONE

MINORITIES AS A PROPORTION OF THE LABOR FORCE FOR ENTRY LEVEL POSITIONS IN THE FLINT POLICE DEPARTMENT, 1962-1992

Year	Minority Proportion of Potential Applicants	Year	Minority Proportion of Potential Applicants
1962	21.7	1977	44.5
1963	24.5	1978	44.5
1964	27.5	1979	44.5
1965	30.4	1980	44.6
1966	33.3	1981	44.7
1967	36.2	1982	44.8
1968	39.1	1983	44.9
1969	42.0	1984	45.0
1970	44.5	1985	45.1
1971	44.5	1986	45.2
1972	44.5	1987	45.3
1973	44.5	1988	45.4
1974	44.5	1989	45.5
1974	44.5	1990	45.6
1975	44.5	1991	45.7
1976	44.5	1992	45.8

Source:

1962-1990: Calculations from U.S. Census data, as reported in *The Representation of Minorities at the Rank of Sergeant in the Flint Police Department: A Labor Market Analysis* (April 1990) (see especially Appendix One and Table One).

1991-1992: Linear extrapolation from the years 1980-1990.

Appendix L

III. MINORITY REPRESENTATION AT THE RANK OF SERGEANT AS OF JANUARY 1992

The minority proportion of the department's entry-level labor pool in 1992, estimated in section II of this report at 45.8 percent, is relevant to hiring into the Department today. However, officers currently occupying the rank of sergeant in the Department were initially hired between five and 30 years ago. In those earlier years, the minority proportion of the population of the Flint area was less than it is today. Therefore, even if hiring and promotions throughout the Department's history had imposed no adverse impact on minorities, minorities would still be expected to account for less than 45.8 percent of sergeants. The data in Table One can be used to take account of this effect.

For present purposes, we need an estimate of the extent to which minorities would be expected at the rank of sergeant had hiring and promotions in the Department always been conducted in a manner that did not exercise an adverse impact on minorities. In such a system, we would expect to find minority officers represented at the rank of sergeant in proportion to their representation among the pool of candidates available for initial hiring of police officers in the years during which today's sergeants had been hired.

Table Two applies the data in Table One to derive this expected figure. Column (1) of Table Two indicates that the 78 persons who held the rank of sergeant in January 1992[7] had been initially hired as police officers between 1962 and 1987. Column (2) of the table then repeats from Table One the minority representation in the labor pool for police hiring during each of those years, and column (3) derives their weighted average. The

[7] January 7, 1992 was the most recent date for which City personnel data were available when this report was prepared.

result, shown at the bottom of Column (3), is that 32.4 sergeants of the 78 sergeants — 41.5 percent — would be expected to be minority. That is, *41.5 percent is the representation of minorities at the rank of sergeant that would be expected, as of January 1992, had hiring and promotions been conducted throughout the history of the Flint Police Department with no adverse impact on minorities.*

Table Two then compares this expected minority representation to the actual minority representation. According to Column (4) of the Table, as of January 1992, there were 28 minority sergeants, or 35.9 percent of officers at that rank. The difference between expected and actual representation is then shown in column (5) to be 4.4 sergeants. *As of January 1992, the shortfall from expected minority representation at the rank of sergeants is 4.4 sergeants, or 5.6 percent.*

Appendix L

TABLE TWO

MINORITY SHORTFALL FROM PROPORTIONATE REPRESENTATION AT THE RANK OF SERGEANT, FLINT POLICE DEPARTMENT, JANUARY 1992

Year of Hire	(1) Number of Jan. 1992 Sergeants Hired that Year	(2) Minority Proportion of Entry-Level Labor Pool that Year	(3) Expected Minority Representation	(4) Number of Jan. 1992 Minority Sergeants Hired that Year	(5) Shortfall from Proportionate Minority Representation
1962	2	21.7%	.434		
1964	1	27.5	.275		
1965	5	30.4	1.520		
1966	3	33.3	1.000		
1967	5	36.2	1.810	1	
1968	2	39.1	.782		
1969	9	42.0	3.780		
1970	7	44.5	3.115	2	
1971	1	44.5	.445		
1972	2	44.5	.890	1	
1973	7	44.5	3.115	2	
1974	15	44.5	6.675	9	
1975	1	44.5	.445		
1977	4	44.5	1.780	1	
1978	4	44.5	1.780	2	
1983	6	44.9	2.694	5	
1985	3	45.1	1.353	3	
1987	1	45.3	.453		
Total	78		32.4	28	4.4
Percent	100.0%		41.5%	35.9%	5.6%

Sources:

(1) City of Flint personnel records as of January 7, 1992.

(2) Table One.

(3) Column (3) = Column (1) multiplied by column (2).

Appendix L

(4) City of Flint personnel records as of January 7, 1992.

(5) Column (5) = Column (3) minus column (4).

Details may not add to totals due to rounding.

IV. MINORITY REPRESENTATION IN A COMPLEMENT OF 83 SERGEANTS

It is my understanding that the Flint Police Department may, in the near future, promote five persons from the rank of police officer to the rank of sergeant, to bring the complement of sergeants to 83. I further understand that these promotion may reflect a 1:1 promotional ratio for minorities and non-minorities, with three of the five promotions going to minorities.

What would be the shortfall in minority representation after such promotions take place? The following table summarizes the arithmetic of the proposed changes:

	Total Sergeants	Minority Sergeants	Expected Minority Sergeants	Shortfall
Before Promotions	78	28	32.4	4.4
After Promotions	83	31	32.4[8]	1.4

As these figures indicate, *promotion of five persons to sergeant, three of them minority, would reduce the shortfall in minority representation from 4.4 to 1.4. It would not reduce the shortfall to zero.*

If the number of sergeants remains no larger than 83, then opportunities for the Department to promote additional officers to sergeant will be limited by the rate at which retirement, disability, and promotions to lieutenant create vacancies at the rank of

[8] The promotions themselves would probably raise this figure, to an extent dependent on the hire dates of the individuals promoted. However, this change is likely to be slight.

sergeant. In an earlier report,[9] I utilized the Police Department's past experience to estimate that such vacancies are likely to arise at the rate of approximately five vacancies per year. To close a shortfall in minority representation of 1.4 would require promoting two minority officers. To promote two minority officers under a 1:1 ratio of minorities and non-minorities (with the first turn allocated to a non-minority) would require a total of four promotions. These promotions, in turn, may increase expected minority representation by one more minority sergeant, reflecting the more recent hire dates (and therefore higher expected minority representation) of newly-promoted sergeants. Accordingly, between four and six promotions might be required to eliminate the shortfall entirely, with opportunities arising to make such promotions at the rate of approximately five per year. Thus, *the shortfall in minority representation at the rank of sergeant that will remain after the round of promotions currently being contemplated might be eliminated through further promotions over the course of approximately one year.*

[9] See Appendix II to my April 1990 report on minorities.

Appendix L

V. COMPARING MINORITY REPRESENTATION BETWEEN SERGEANTS AND POLICE OFFICERS

The procedures applied in Section III of this report to estimate the current shortfall at the rank of sergeant can be applied in parallel to estimate the shortfall at the rank of police officer. This is done in Table Three.

Column (1) of Table Three indicates that the 229 persons who held the rank of police officer in January 1992 had been hired between 1962 and 1991. Column (2) of the table then repeats from Table One the minority representation in the labor pool for police hiring during each of those years, and column (3) derives their weighted average. The result, shown at the bottom of Column (3), is that 100.9 police officers — 44.1 percent — would be expected to be minority. That is, *44.1 percent is the representation of minorities at the rank of police officer that would be expected, as of January 1992, had hiring been conducted throughout the history of the Flint Police Department with no adverse impact on minorities.*

Table Three then compares this expected minority representation to the actual minority representation. According to Column (4) of the table, as of January 1992, there were 75 minority officers at the rank of police officer, or 32.8 percent of officers at that rank. The difference between expected and actual representation is then shown in column (5) to be 25.9 officers. *As of January 1992, the shortfall from expected minority representation at the rank of police officer is 25.9 officers (11.2 percent).*

Appendix L

TABLE THREE

MINORITY SHORTFALL FROM PROPORTIONATE REPRESENTATION AT THE RANK OF POLICE OFFICER, FLINT POLICE DEPARTMENT, JANUARY 1992

Year of Hire	(1) Number of Jan. 1992 Officers Hired that Year	(2) Minority Proportion of Entry-Level Labor Pool that Year	(3) Expected Minority Representation	(4) Number of Jan. 1992 Minority Officers Hired that Year	(5) Shortfall from Proportionate Minority Representation
1962	1	21.7%	.217		
1964	1	27.5	.275		
1965	7	30.4	2.128		
1966	2	33.3	.666		
1967	3	36.2	1.086		
1968	3	39.1	1.173		
1969	8	42.0	3.360		
1970	1	44.5	.445	1	
1971	2	44.5	.890		
1972	1	44.5	.445	1	
1973	7	44.5	3.115	4	
1974	11	44.5	4.895	2	
1975	8	44.5	3.560	1	
1977	15	44.5	6.675	1	
1978	11	44.5	4.895		
1980	1	44.6	.446	1	
1983	10	44.9	4.490	1	
1985	28	45.1	12.628	12	
1986	15	45.2	6.780	5	
1987	26	45.3	11.778	13	
1989	35	45.5	15.925	10	
1990	2	45.6	.912		
1991	31	45.7	14.167	12	
Total	229		100.9	75	25.9
Percent	100.0%		44.1%	32.8%	11.3%

Sources:

(1) City of Flint personnel records as of January 7, 1992.

(2) Table One.

Appendix L

(3) Column (3) = Column (1) multiplied by column (2).

(4) City of Flint personnel records as of January 7, 1992.

(5) Column (5) = Column (3) minus column (4).

Details may not add to totals due to rounding.

In the first report which I prepared concerning the Flint Police Department, I estimated the shortfall of minorities at the rank of police officers in 1984 to be 47 officers.[10] By January 1992 — eight years later — the estimated shortfall had fallen to 25.9 officers, a reduction of less than half of the original shortfall. Thus, *some progress has been made in eliminating the minority shortfall at the police officer rank, but a substantial shortfall remains.*

In this connection, I have been provided with report titled *Comparison of the Proportion of Black Sergeants and Black Patrol Officers, 1980-1989,* prepared by Harry Frank, Ph.D. On page one of that report, Dr. Frank states that

> the majority of sergeants [in the Flint Police Department] are the result of internal promotion. Accordingly, it is arguable that [in calculating the expected representation of blacks at the rank of sergeant] the relevant and appropriate statistical population is the cadre of Flint Police Department patrol officers... (page 1).

I agree with Dr. Frank's contention — with one crucial amendment:[11] The "relevant and appropriate statistical

---

[10] See my report *Minority Hiring and Promotion in the Flint Police Department: A Labor market Analysis* (April 1984), page 7.

[11] A second, more minor amendment is that these calculations should weight different years of hiring in proportion to the number of officers who are now *sergeants* who were hired that year. As Dr. Frank currently does his calculations, he implicitly weights different years by the number of officers who are still *police officers* who were hired that year. My calculations explicitly incorporate the appropriate weights.

population" is the cadre of Flint Police Department patrol officers *that would exist had hiring and other personnel processes in the Department always been conducted without adverse impact on minorities.* The racial/ethnic composition of the *actual* cadre differs substantially from that group, as shown every report I have produced since 1984, including the present one.

Furthermore, according to such sources as Flint's then-Chief of Police, this shortfall reflects racial discrimination. For example, in public testimony before the City's Human Relations Commission in 1984, Police Chief Miles White stated:[12]

> In May of 1977 the federal District Court found the City and the Police Department guilty of unlawful racial discrimination in the employment and promotion of police officers. The decision of the court was not a surprise. Flint, like most American cities, has a long tradition of racial exclusion in its Police Department....In 1965, there were only 2 black police officers among the approximately 240 uniformed service....Prior to September 25, 1974, no minority had ever been promoted above the entry level rank.

In light of such information, it is inappropriate to assume, as Dr. Frank implicitly does, that actual minority representation at the rank of police officer is what would be observed if hiring and promotion had been conducted throughout the history of the Department with no adverse impact on minorities. To do so would be to use discrimination at the police officer rank to excuse discrimination at the sergeant rank. Suppose, for example, that discrimination had been totally effective so that the number of minorities at both the police officer rank and the sergeant rank

---

[12] See *Presentation of Miles White, Chief of Police, City of Flint, Michigan [To the City of Flint Human Relations Commission]* (1984), p.1, p. 4.

was zero. Under Dr. Frank's approach, because there was *no difference* between minority representation at the two ranks, we would conclude that there was *no discrimination* at the rank of sergeant.

To avoid such an absurd conclusion, I have utilized Census data to estimate what minority representation at the rank of police officer would have been in the absence of adverse impact on minorities during the hiring process. I then estimate expected minority representation at the rank of sergeant by assuming that minorities would have been promoted to sergeant in a discrimination-free manner from this discrimination-free police officer pool.

In doing such calculations, at no time do I assume that police sergeants are actually hired from the general Flint community directly into the rank of sergeant, as Dr. Frank apparently misinterprets my reports to say.[13] Nor do I suggest that the goal of rectifying past inequities in the selection process requires that the ratio of minority to non-minority sergeants mirror the composition of the community, as Dr. Frank apparently believes I do.[14] If such were my position, then I would advocate using the minority representation in Flint's *total population* as a goal for the rank of

---

[13] For example, in a recent deposition, Dr. Frank made the following statement with respect to my 1984 report:

> The Bendick report treats the broader Flint community as the relevant statistical pool [for sergeants], and I think that is patently inappropriate.

(Deposition of Harry Frank, Ph.D., in *Middleton et al. v. City of Flint and the Flint Police Officers Association*, September 17, 1991, p. 29.)

[14] In letter to Gregg Gibbs, Esq., dated March 27, 1990, Dr. Frank wrote (page 1):

> Is the goal to rectify past inequities in the selection procedure or is the goal (as implied by the Bendick report) to achieve a ratio of white to black sergeants that mirrors the composition of the community? If the latter is the goal (social engineering rather than bias-free selection) . . .

sergeant; according to the 1990 Census, that figure is 53.2 percent.[15] Instead, as is clearly stated in Section III of this report, I propose a figure of 41.5 percent (as of January 1992). I do so because a 41.5 percent minority representation among sergeants would, in Dr. Frank's terminology, "rectify past inequities in the selection process." Dr. Frank's proposed alternative — which appears to be 30.0 percent as of 1989[16] — would not.

VI. GOALS FOR THE SERGEANT RANK BASED ON OPERATIONAL NEEDS

The first five sections of this report have focused on achieving minority representation in the Flint Police Department that represents equal employment opportunities between minority and non-minority officers. Such considerations reflect one of two distinct approaches to the question of minority representation in a police department. The other approach focuses not on equity for employees but on the "operational needs" of the Department in relating to the citizens it is assigned to protect and to serve.

This set of consideration was discussed by then-Chief of Police White in his 1984 testimony before the City Human Relations Commission in the following terms:[17]

> Apart from the need to remedy prior employment discrimination, there is the related and critically important

---

[15] This figure is calculated from the Census's Bureau's count of the City's population in 1990, modified by the Census' Bureau's technical adjustment for the "Census undercount."

[16] This figure appears in Table One on page 2 of Dr. Frank's report *Comparison of the Proportion of Black Sergeants and Black Patrol Officers 1980-1989.*

[17] See *Presentation of Miles White, Chief of Police, City of Flint, Michigan [To the City of Flint Human Relations Commission]* (1984), pp. 6-8.

need to regain the trust and confidence of the minority segment of the population of this City. A direct consequence of the years of exclusion of minorities from our Police Department has been a notable absence of sensitivity and concern for the interests of minority citizens. This lack of sensitivity and concern sometimes has resulted in racially discriminatory conduct by some police officers. The Department's prior slow response to minority citizen complaints of inadequate or unfair treatment by the police has, over the years, resulted in deep distrust and suspicion of the Department on the part of large segments of the minority community. . . . The affirmative action policy which I urge the Commission to adopt will serve to improve police community relations. It goes without saying that in order for this or any other police department to operate effectively within the community, it needs to have the confidence of its citizens. Our long term failure to more closely reflect the racial make-up of the population we serve has made it impossible for us to establish good police community relations. If all segments of the community see their friends and neighbors represented throughout the rank structure of their Police Department, we will be able to establish the good police community relations that we need. Studies of incidents of police brutality and discrimination by police officers toward minority citizens have shown repeatedly that improving minority representation within the structure of the Police Department has operated to reduce the number of such incidents and change the perception held by many members in the minority community that brutality and discrimination is the routine or ordinary means of operation of the Police Department. The

presence of large numbers of minorities in our Police Department will result in the realization by citizens that they will be treated fairly and it will serve to encourage greater citizen acceptance and cooperation with the department.

To Chief White's statement, I would add two points.

First, recent research and innovations in police departments around the country have focused even greater attention on police-community relations than was prevalent in 1984. There is growing consensus in the public safety field that a particularly efficient and effective approach to policing is what is called "community empowerment policing." This approach de-emphasizes the crime suppression role of patrolling police officers in favor of partnerships between citizens and beat officers in preventing crime in their communities.[18] Such approaches cannot be effectively implemented without mutual community-police trust and open officer-citizen communication. Thus, the role of minority representation at all ranks of the Department in building rapport with minority communities has become even more important than it was when Chief Miles described it in 1984.

Second, recent research and innovations in both the public and private sectors have focused increased attention on the importance of first line supervisors in determining the productivity of organizations.[19] Whether it is in auto assembly plants, airline

[18] See, for example, *Beyond Command and Control: The Strategic Management of Police Departments* (Washington, D.C.: The Police Executive Research Foundation, 1990).

[19] See, for example, Mary Lou Egan and Marc Bendick, Jr., *Managing Greater Washington's Changing Work Force: Keys to Productivity and Profit* (Washington, D.C.: Greater Washington Research Center, 1991), especially pp. 36-37.

reservation centers, health clinics, or fast food restaurants, experts in organizational efficiency and effectiveness have become increasingly aware that first line supervisors are key in training and motivating employees, communicating organizational policies "downward" and worker insights "upward," efficiently assigning workers and managing resources, maintaining product quality, resolving customer complaints, and solving minor problems before they become major ones. In many aspects of police work, these crucial first-line supervisory posts are held by sergeants. Chief Miles argued that it is important that minority representation at every rank of the Department should mirror the community. His point is even more important for sergeants; that is the rank where such representation is perhaps most crucial of all.

Based on the foregoing, I conclude that *under-representation of minorities at the rank of sergeant is likely to have adversely affected the operational efficiency and effectiveness of the Flint Police Department. Because this under-representation continues to exist, it is likely to continue to hamper that efficiency and effectiveness.*

In consideration of the "operational needs" just discussed, police departments may establish goals for minority representation at entry or supervisory ranks that match the minority representation in the city's overall population. In fact, that was Chief Miles' recommendation for Flint in 1984.[20] As was discussed in Section V of this report, in Flint currently this figure is approximately 53.2 percent.

Obviously, the 41.5 percent goal for minority representation at the level of sergeants — based on equalization of employment opportunities — is lower than this 53.2 percent figure. However,

---

[20] See *Presentation of Miles White, Chief of Police, City of Flint, Michigan [To the City of Flint Human Relations Commission]* (1984), pp. 8-9.

continued movement toward, and achievement of, the 41.5 percent level would move the Department in the correct direction. Thus, *continuing to eliminate minority under-representation at the sergeant level until a 41.5 percent level is achieved is likely to continue to advance the operational needs of the Department.*

Appendix L

APPENDIX ONE

CALCULATION OF MINORITY REPRESENTATION IN THE LABOR POOL OF PERSONS RELEVANT TO ENTRY-LEVEL RECRUITING FOR THE FLINT POLICE DEPARTMENT, 1962 - 1992

The calculations performed in this appendix produce the estimates of black representation in the labor pool for entry-level hiring reported in Table One of this report.

The period in question in this analysis encompasses the years 1960[21] through 1990. During that time, the set of persons most relevant for hiring as police officers with Flint Police Department:

— were members of the civilian labor force;[22]

— had completed at least the twelfth grade; and

— met the age-range requirements current as of the year in question (starting in 1973, 18-34; prior to that time, 21-34).

Data for the City of Flint corresponding to these characteristics are presented from the Census of 1980, 1970, 1960, and 1950 in Tables I-A, I-C, and I-D.

It is well-established that, in counting the residents of an area, the Census tends to miss minority persons at a greater rate than it misses non-minorities. Therefore, the Census Bureau has prepared a set of adjustment factors to offset this source of error. These adjustment factors are presented in Table I-B.

---

[21] Data for 1950 are presented in this appendix, although they are no longer utilized in calculations.

[22] That is, they were currently employed (but not in the military) or were not currently employed but were actively seeking work.

Appendix L

To estimate the minority proportion of the labor force for recruitment in the years 1980, 1970, and 1960, the first step is to multiply corresponding entries in Tables I-A through I-D. This process generates counts of the number of persons of each age, race, and gender group who meet the residence, age, educational, and work-status criteria discussed above. Next, the counts for minority persons were adjusted upward by six percent to account for a higher propensity for minorities to apply for civil service jobs such as police positions. Then, total counts were computed for minorities and non-minorities and for both groups together, and the former was divided by the latter. The result is an estimate of the minority proportion in the labor pool for entry-level hiring in the Police Department as of the years 1980, 1970, and 1960 from among residents of the city of Flint.

Throughout the period in question, there has been no requirement that applicants for police employment reside within the city of Flint. While many applications do come from city residents, other applications come from adjacent areas of Genesee County and from elsewhere in the State of Michigan. The population of the city of Flint includes a higher proportion of minorities than does either of these two other sources of application. Therefore, it is important to adjust estimates of minority representation based on the city of Flint alone by differences between the Flint population and that in these other two areas. Factors for doing so are presented in Table I-E.

After this adjustment, these resultant estimates for the years 1980, 1970, 1960, and 1950 appear in their respective lines in Table I-F, marked by asterisks. For years other than these Census years, estimates were created by linear interpolation or extrapolation from the estimates marked with an asterisk. These interpolated/extrapolated figures appear in the remaining lines of Table I-F.

Appendix L

The figures appearing in Table One of this report repeat the figures in Table I-F.

TABLE I-A

NUMBER OF RESIDENTS BETWEEN 18 AND 34, BY AGE, RACE, AND GENDER, CITY OF FLINT, 1950-1980

	1980		1970		1960		1950	
Age	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority
				Males				
18	677	757						
19	677	757						
20	954	719						
21	954	719	1118	410	966	191	1364	130
22	954	719	1118	410	966	191	1364	130
23	954	719	1118	410	966	191	1364	130
24	954	719	1118	410	966	191	1364	130
25	815	710	1057	349	1106	307	1320	143
26	815	710	1057	349	1106	307	1320	143
27	815	710	1057	349	1106	307	1320	143
28	815	710	1057	349	1106	307	1320	143
29	815	710	1057	349	1106	307	1320	143
30	571	527	732	312	1151	315	1062	129
31	571	527	732	312	1151	315	1062	129
32	571	527	732	312	1151	315	1062	129
33	571	527	732	312	1151	315	1062	129
34	571	527	732	312	1151	315	1062	129
				Females				
18	732	836						
19	732	836						
20	1031	795						
21	1031	795	1310	561	1086	268	1335	140
22	1031	795	1310	561	1086	268	1335	140
23	1031	795	1310	561	1086	268	1335	140
24	1031	795	1310	561	1086	268	1335	140
25	880	669	991	423	1077	314	1229	150
26	880	669	991	423	1077	314	1229	150
27	880	669	991	423	1077	314	1229	150
28	880	669	991	423	1077	314	1229	150
29	880	669	991	423	1077	314	1229	150
30	617	584	735	373	1149	296	1146	135
31	617	584	735	373	1149	296	1146	135
32	617	584	735	373	1149	296	1146	135
33	617	584	735	373	1149	296	1146	135
34	617	584	735	373	1149	296	1146	135

Appendix L

Sources:

1980: U.S. Bureau of the Census, *1980 Census of Population, Michigan: General Social and Economic Characteristics,* PC80-1-C24, Part 24, Volume I, tables 58, 59, 126, 132, 138, 144, and 150.

1970: U.S. Bureau of the Census, *1970 Census of Population, Michigan: Characteristics of the Population,* Part 24, Volume 1, tables 135, 138, 149, and 140.

1960: U.S. Bureau of the Census, *Census of Population: 1960, Michigan: Characteristics of the Population,* Part 24, Volume 1, table 20.

1950: U.S. Bureau of the Census, *Census of Population: 1950, Michigan: Characteristics of the Population,* Part 22, Volume 2, table 33.

Note: In 1980, the police department was hiring persons in the age range 18-34. In 1970, 1960, and 1950, the relevant age range was 21-34.

Appendix L

TABLE I-B

ADJUSTMENT FACTOR FOR CENSUS UNDERCOUNT, BY AGE, RACE, AND GENDER, 1950-1980, NATIONWIDE

	1980		1970		1960		1950	
Age	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority
				Males				
15-19	−2.0%	−.7%	.8%	4.4%	3.8%	12.3%	2.8%	11.2%
20-24	−2.2	7.2	1.4	12.7	4.3	18.4	2.8	11.2
25-34	−.4	11.6	3.6	19.0	3.6	18.5	2.8	11.2
				Females				
15-19	−2.0%	−1.0%	.1%	3.3%	2.4%	9.6%	2.1%	8.2%
20-24	−2.9	1.6	.3	5.8	2.4	9.5	2.1	8.2
25-34	−2.3	1.4	1.3	6.5	1.0	6.5	2.1	8.2

Sources:

1980 and 1970: U.S. Bureau of the Census, *Coverage of the National Population in the 1980 Census, by Sex, and Race,* Special Study P-23, number 115, February 1982, table 4.

1960 and 1950: U.S. Bureau of the Census, *1970 Census of Population and Housing, Estimate of Coverage of Population by Sex, Race, and Age,* Report PHC(E)-4, February 1974, tables 3 and 6.

Appendix L

TABLE I-C

PROPORTION OF THE POPULATION BETWEEN 18 AND 34 FALLING IN THE EDUCATIONAL RANGE RELEVANT TO ENTRY-LEVEL POLICE POSITIONS, BY AGE, RACE, AND GENDER, CITY OF FLINT, 1950-1980

	1980		1970		1960		1950	
Age	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority
				Males				
18	.404	.267						
19	.450	.387						
20	.471	.408						
21	.464	.399	.659	.653	.402	.322	.443	.235
22	.463	.385	.659	.653	.402	.322	.443	.235
23	.455	.402	.659	.653	.402	.322	.443	.235
24	.451	.402	.659	.653	.402	.322	.443	.235
25	.398	.390	.590	.590	.362	.260	.392	.177
26	.398	.390	.590	.590	.362	.260	.392	.177
27	.398	.390	.590	.590	.362	.260	.392	.177
28	.398	.390	.590	.590	.362	.260	.392	.177
29	.398	.390	.590	.590	.362	.260	.392	.177
30	.352	.382	.449	.391	.402	.198	.341	.147
31	.352	.382	.449	.391	.402	.198	.341	.147
32	.352	.382	.449	.391	.402	.198	.341	.147
33	.352	.382	.449	.391	.402	.198	.341	.147
34	.352	.382	.449	.391	.402	.198	.341	.147
				Females				
18	.505	.420						
19	.500	.458						
20	.495	.420						
21	.474	.405	.646	.607	.492	.339	.561	.282
22	.487	.404	.646	.607	.492	.339	.561	.282
23	.490	.412	.646	.607	.492	.339	.561	.282
24	.488	.412	.646	.607	.492	.339	.561	.282
25	.469	.402	.565	.488	.464	.307	.510	.238
26	.469	.402	.565	.488	.464	.307	.510	.238
27	.469	.402	.565	.488	.464	.307	.510	.238
28	.469	.402	.565	.488	.464	.307	.510	.238
29	.469	.402	.565	.488	.464	.307	.510	.238
30	.479	.420	.544	.434	.436	.275	.438	.197
31	.479	.420	.544	.434	.436	.275	.438	.197
32	.479	.420	.544	.434	.436	.275	.438	.197
33	.479	.420	.544	.434	.436	.275	.438	.197
34	.479	.420	.544	.434	.436	.275	.438	.197

Appendix L

Sources:

1980: U.S. Bureau of the Census, *1980 Census of Population, Michigan: Detailed Characteristics*, table 203.

1970: U.S. Bureau of the Census, *1970 Census of Population, Michigan: Detailed Characteristics*, table 148.

1960: U.S. Bureau of the Census, *Census of Population: 1960, Michigan: Detailed Characteristics*, table 103.

1950: U.S. Bureau of the Census, *Census of Population: 1950, Michigan: Characteristics of the Population*, table 65.

Note: In 1980, 1960, and 1950, the relevant educational range for entry-level positions in the Flint police department was high school graduate. In 1970, it was either high school graduated or one year of college.

Appendix L

TABLE I-D

PROPORTION OF THE POPULATION BETWEEN 18 AND 34 PARTICIPATING IN THE LABOR FORCE, BY AGE, RACE, AND GENDER, CITY OF FLINT, 1950-1980

	1980		1970		1960		1950	
Age	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority	Non Minority	Minority
				Males				
18	.673	.471						
19	.829	.609						
20	.883	.747						
21	.900	.790	.845	.776	.945	.843	.931	.775
22	.921	.812	.963	.908	.942	.928	.940	.790
23	.920	.817	.963	.908	.954	.952	.945	.797
24	.933	.819	.963	.908	.971	.952	.970	.819
25	.951	.871	.960	.944	.980	.958	.965	.868
26	.951	.871	.960	.944	.980	.958	.965	.868
27	.951	.871	.960	.944	.980	.958	.965	.868
28	.951	.871	.960	.944	.980	.958	.965	.868
29	.951	.871	.960	.944	.980	.958	.965	.868
30	.963	.917	.960	.944	.989	.722	.976	.884
31	.963	.917	.960	.944	.989	.722	.976	.884
32	.963	.917	.960	.944	.989	.722	.976	.884
33	.963	.917	.960	.944	.989	.722	.976	.884
34	.963	.917	.960	.944	.989	.722	.976	.884
				Females				
18	.399	.368						
19	.609	.448						
20	.686	.580						
21	.674	.564	.521	.551	.390	.314	.483	.291
22	.681	.595	.489	.601	.354	.330	.479	.307
23	.627	.557	.489	.601	.337	.342	.417	.308
24	.650	.673	.489	.601	.343	.360	.368	.314
25	.589	.671	.392	.576	.299	.381	.351	.338
26	.589	.671	.392	.576	.299	.381	.351	.338
27	.589	.671	.392	.576	.299	.381	.351	.338
28	.589	.671	.392	.576	.299	.381	.351	.338
29	.589	.671	.392	.576	.299	.381	.351	.338
30	.573	.712	.392	.516	.307	.458	.320	.371
31	.573	.712	.392	.516	.307	.458	.320	.371
32	.573	.712	.392	.516	.307	.458	.320	.371
33	.573	.712	.392	.516	.307	.458	.320	.371
34	.573	.712	.392	.516	.307	.458	.320	.371

Appendix L

Sources:

1980: U.S. Bureau of the Census, *1980 Census of Population, Michigan: Detailed Characteristics,* table 213.

1970: U.S. Bureau of the Census, *1970 Census of Population, Michigan: Detailed Characteristics,* tables 85 and 92.

1960: U.S. Bureau of the Census, *Census of Population: 1960, Michigan: Detailed Characteristics,* table 115.

1950: U.S. Bureau of the Census, *Census of Population: 1950, Michigan: Characteristics of the Population,* table 66.

Appendix L

TABLE I-E

MINORITY REPRESENTATION IN THE GENERAL POPULATION, CITY OF FLINT, ITS SURROUNDING COUNTY, AND THE REMAINDER OF THE STATE OF MICHIGAN, 1950-1980

	1980	1970	1960	1950
City of Flint	45.1%	28.6%	17.7%	8.6%
Genesee County excluding city of Flint	17.8	3.0	2.1	.2
State of Michigan excluding Genesee County	15.7	11.7	9.4	7.1
Ratio of Minority Representation in the Geographically-Weighted Labor Pool* to Minority Representation in city of Flint	.82	.76	.77	.78

Sources:

1980: U.S. Bureau of the Census, *1980 Census of Population, Michigan: General Social and Economic Characteristics,* table 58.

1970: U.S. Bureau of the Census, *1970 Census of Population, Michigan: General Population Characteristics,* table 16.

1960: U.S. Bureau of the Census, *Census of Population: 1960, Michigan: Characteristics of the Population,* table 13.

1950: U.S. Bureau of the Census, *Census of Population: 1950, Michigan: Characteristics of the Population,* table 11.

* The geographically-weighted labor pool consists of 70 percent city of Flint, 20 percent Genesee County excluding the city of Flint, and 10 percent state of Michigan excluding Genesee County. These weights are the approximate average of data on the residency of new recruits to the Flint police department, 1952-1982.

Appendix L

TABLE I-F

MINORITIES AS A PROPORTION OF THE POOL OF APPLICANTS FOR ENTRY LEVEL POSITIONS IN THE FLINT POLICE DEPARTMENT, 1950-1990

Year	Minority Proportion of Potential Applicants	Year	Minority Proportion of Potential Applicants
1950*	4.5%	1970*	44.5%
1951	5.6	1971	44.5
1952	6.7	1972	44.5
1953	7.8	1973	44.5
1954	8.9	1974	44.5
1955	10.0	1975	44.5
1956	11.1	1976	44.5
1957	12.2	1977	44.5
1958	13.3	1978	44.5
1959	14.4	1979	44.5
1960*	15.6	1980*	44.6
1961	18.8	1981	44.7
1962	21.7	1982	44.8
1963	24.5	1983	44.9
1964	27.5	1984	45.0
1965	30.4	1985	45.1
1966	33.3	1986	45.2
1967	36.2	1987	45.3
1968	39.1	1988	45.4
1969	42.0	1989	45.5
		1990	45.6
		1991	45.7
		1992	45.8

Source:

* Census year; estimate is calculated from Census data using methodology described in this appendix.

Estimates for other years is created by linear interpolation or extrapolation from Census years.

Appendix M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

TOM WALDRON II, ET AL.,
Plaintiffs,

v.

FLINT POLICE PATROLMEN'S ASSOCIATION, ET AL.,
Defendants.

CIVIL ACTION
NO. 75-40084

/

MEMORANDUM OPINION AND RECOMMENDATION

The matter before this Court was referred to the United States Magistrate, Harvey D. Walker, by United States District Judge, James Harvey, pursuant to 28 USC 636(b)(2) and Local Rule XXVIII(d) of the Local Rules of the United States District Court for the Eastern District of Michigan by an Order dated December 4, 1979. Under the statute 28 USC 636(b)(1)(B), as amended, the United States Magistrate is to make proposed findings, conclusions and recommendations which are set forth herein. The statute also provides that within ten (10) days after being served with a copy of the Magistrate's proposed findings of fact and recommendations under Subsection (B), any party may serve and file written objections to such proposed findings and recommendations as provided by rules of the Court, and that the United States District Judge shall make a *de novo* determination of any matter to which such objection is made.

Trial was held in this matter on July 11, 12 and 16, 1979. At the commencement of trial, as a preliminary matter, Plaintiffs moved the Court for leave to amend their February 24, 1976,

Amended Complaint pursuant to F R Civ P 15(b). The Defendants objected and claimed that the Plaintiffs never filed a Second Amended Complaint even after they received leave to do so when their Motion for Reconsideration was granted by United States District Judge James Harvey by Order dated September 16, 1976. In that Order, the Plaintiffs were granted leave to amend the February 24, 1976, Amended Complaint to include causes of action under 42 USC 1981 and 42 USC 2000(c)(5).

This Court ruled that since the Plaintiffs never filed pursuant to the leave granted by United States District Judge James Harvey, the Complaint of February 24, 1976, would stand and that the Court would adhere to the causes of action alleged in said Complaint under 42 USC 1983, US Const, Am V and XIV; Michigan Const 1963, Art 1, §2 and the State of Michigan Fair Employment Practices Act, §3, (MCLA 423.303). Therefore, the Plaintiffs were denied their Motion to Amend the February 24, 1976, Amended Complaint because over two years had elapsed after leave was given to so amend.

Another preliminary matter was stipulated to by counsel which provided that the Party-Plaintiff Robert Lorey remain as a party, and that one Bruce Onore be added as a Party-Plaintiff. The Court so ordered.

Findings of Fact

The facts as the Court perceives them are that the Plaintiffs are all white police patrolmen employed by the City of Flint Police Department in 1973, who claim that the policies of the City of Flint kept them from being promoted to the rank of sergeant.

This action centers around a promotional examination administered in July, 1973, pursuant to the rules and regulations of

the City of Flint Civil Service Commission. The Party Plaintiffs all took said examination for the purpose of determining their eligibility for promotion to the rank of sergeant. It is important to note that the examination that was given was validated for correlation between the job and the examination questions, and for cultural neutrality.

From the examination scores an eligibility list was promulgated, and the Plaintiffs were ranked by numbers 57 through 63, respectively. According to the Flint City Charter, the promotional eligibility list expired after two years. During the life of the eligibility list referred to above, a Consent Judgment in the form of an Agreement was entered by Honorable Philip C. Elliott, Genesee County Circuit Court dated November 22, 1974, (Exhibit #2) between the City of Flint and the Flint Police Patrolmen's Association (FPPA). The FPPA, a labor association of police officers acting as their collective bargaining agent, was duly recognized by the City of Flint at that time. By the terms of this agreement or Consent Judgment, the Flint City officials and the FPPA entered into an agreement to the effect that the educational and experience requirements necessary to attain the rank of sergeant be altered. The alterations which ensued altered the importance of seniority status as well as the educational requirements. Based thereon, dual eligibility lists were made from the data received from the examinations and as a result certain minority officers were promoted before the Plaintiffs who had higher examination scores. These minority police officers had

been ranked as follows on the same eligibility list that the Plaintiffs had been listed:

Arthur Evans	91
Henry A. Townsend	137
Nathaniel M. Albritton	156
Kenneth Burns	162
Milton W. Oglesbee, Jr.	163
Richard Dicks	166
Wendell Banks	181

Upon its face it would appear that there might have been discrimination against the Plaintiffs herein. However, some background facts were offered seeking to dispel this view.

The uncontroverted facts show that the population of the City of Flint for the years 1960, 1970, 1974 and 190,000; 193,000 and 187,000, respectively. The black population percentage of the City in those years was approximately 17%, 28% and 34%. Therefore, as one can see, the black population was growing rapidly in the City of Flint and was substantially higher than the minority percentage on the police force. The facts also show that the Flint Police Department never had more than 12 minority police officers at one time, and that all of the blacks ever hired numbered only 24. These facts were included in the Findings of Fact in the United States District Judge James Harvey's opinion in *Alfaro* v *Suber*, United States District Court for the Eastern District of Michigan, Civil Action #613, Memorandum Opinion and Order dated May 8, 1977. In the same above cited opinion it was found that in 1971, out of a total police force of 397 only 10 were black or minorities, and as late as 1977 out of a police force of 450 only 47 were black or minorities. Before 1974 no black or minority had ever been permanently promoted above the initial entry level.

Appendix M

The facts show that the agreement entered into between the FPPA and the City of Flint as set out in the Consent Judgment was to expire upon its own terms within five years or when the number of black sergeants equalled 15% of the total number of sergeancies. At the same time the City raised the number of police sergeancies from 80 to 87, and therefore, the same number of positions (80) were available to white police officers. Therefore, in summation, the Consent Judgment entered into by the FPPA, the City of Flint and the Society of Afro-American Police, not a party herein, can be condensed into the following list of agreed matters:

1. That two eligibility lists be promulgated by race;

2. That the rate of appointment be alternated from one eligibility list to the other, so as to result in the appointment of one minority to every four non-minorities;

3. The City agreed to maintain a minimum of 87 sergeant positions during the course of the agreement;

4. A maximum of 15 seniority points was allowed to be added to promulgate the eligibility list;

5. The time limit for writing a promotional examination would be extended to roughly double what it had been in the past;

6. The agreement was to expire within five years after it was entered into, or, when the positions occupied by minorities within the rank of police sergeant should reach 15 percent, whichever occurred first.

This Consent Judgment was entered into by FPPA and the City of Flint due to their concern over and in order to offset the vast racial imbalance already touched on above.

The Plaintiffs claim that the effect of this agreement was to negate the very purpose of Civil Service Procedures because blacks were to be promoted without regard to their respective ranking. Defendants claim that the facts show invidious discrimination throughout the history of the City of Flint Police Department until the mid-1970's.

Conclusions of Law

The record is burdened with details regarding the manner in which the agreement between the City and the FPPA which based the Consent Judgment was reached. Suggestion that the opportunity for ballot stuffing cast doubt on the true position of the FPPA was countered and to some extent recanted. The record is that in some manner an agreement between the body representing the City of Flint and the members of the City Police Department through its bargaining agent was reached and that as a result promotion of officers to sergeancy was implemented on that basis.

Complaint that the plan created by the Consent Judgment was based on a hurried submission of the plan to the membership of the bargaining unit seems to have been first raised in any substantial form in the course of proofs in this case. The agreement was apparently reached at a point in the progress of the state court case when the bargaining agents representing the FPPA felt that there was a strong possibility that that court might render a decision of more restrictive dimensions relative to promotion of white officers.

Be all this as it may, a review of other decisions in point in this area reveals that in some instances holdings favorable to the position of the Defendants here were not based on any agreement between the employer and the employees but rather on outright

orders. *See Detroit Police Officers Association* v *Coleman A. Young, Mayor of the City of Detroit,* _____ F 2d _____, No. 78-1163 (CA 6, Oct 12, 1979) and *Baker* v *City of Detroit,* _____ F Supp _____, No. 5-71937 (ED Mich, Oct 1, 1979). On the other hand, in *Weber* v *Kaiser Aluminum and Chemical Co.* _____ US _____, 61 L Ed 2d 480, 99 S Ct _____ (1979), the plan was based on negotiation between the private employer and the union. As was pointed out in *Baker* v *City of Detroit, supra:*

> "In any event, this Court can see no reason why an affirmative action plan should rise or fall on whether a union agrees to it. The fact that a union agrees to such a plan is a factor demonstrating that the plan is reasonable—."

The position of the Plaintiffs appears to be that despite the decision in *DPOA* v *Young, supra,* their case is not lost because it was grounded on Title VII violations and 42 USC 1981 violations and Plaintiffs here base their claims on the Fifth and Fourteenth Amendments of the U.S. Constitution, 42 USC 1983 and the Michigan Fair Employment Practices Act. This interpretation of Plaintiffs' position is arrived at on the basis of "Plaintiffs' Addendum and Memorandum of Law" which describes the issues in the case.

There seems little doubt that the recent cases have disposed of the question of whether the ruling in the *Weber case, supra,* was limited in its application to private employers and did not apply to public employer-employee relationships. See *DPOA* v *Young, supra.* As was stated by U.S. Circuit Judge Keith, sitting

by designation as a U.S. District Judge in *Baker* v *City of Detroit*, *supra*:

> "Because the Supreme Court has spoken so strongly of the need for voluntary efforts to eliminate the blight of past discrimination, it is this court's view that *Weber* should apply with full force to employers in the public sector. In other words, a voluntary affirmative action plan which passes muster under *Weber* should also pass muster under the Constitution."

Turning now to Plaintiffs' view that the Defendants plan violates the Fifth and Fourteenth Amendments of the U.S. Constitution this Court must view the claim of a taking without "due process" as one without foundation in that under a large number of federal decisions it has been held that a person does not have a property right in public employment. There are, of course, instances of capricious or arbitrary action on the part of public employers which have been held to warrant examination of possible Constitutional violations. In the main such violations rest on cases of termination of employment in violation of some statutory or contractual guaranty. *See Bishop* v *Wood*, 426 US 341, 48 L Ed 2d 684, 96 S Ct 2074 (1976). In the case at hand no Plaintiff has been terminated. The Plaintiffs have at the most suffered some delay in expected promotion. The City of Flint has not been shown either by ordinance or contract to have promised or guaranteed any officer promotion at any particular time — nor for that matter promotion at all.

With regard to the "equal protection" clause of the Fourteenth Amendment it is recognized that Defendant here, as a public employer, is subject to its restrictions. As was pointed out in the Baker case, supra, the case of *University of California Regents* v *Bakke*, 438 US 265, 57 L Ed 2d 750, 98 S Ct 2733

(1978) recognized certain validity in race-conscious remedies which would be within the limits of the Fourteenth Amendment, but not to be accepted without close scrutiny. Surviving such scrutiny was held to be those cases involving the effects of past discrimination. The record in the instant case clearly shows that until the Consent Judgment was implemented to carry out affirmative action in 1974 in Flint no black officer had ever been promoted beyond entry level despite the fact that the percentage of blacks in the Flint population in the three years before that date went from 17% to 34%. As late as 1971 there were only 10 blacks in a police force of 397 and all of them at entry level. Consequently, there is ground for applying the restrictive area of valid race-conscious remedy to the plan in the instant case and to find no violation of the equal protection clause.

Turning now to the Plaintiffs' claim that the decision in the *DPOA* v *Young* case in the 6th Circuit failed to deal with possible constitutional violations, this Court turns to Circuit Judge Lively's instructions in that case directed to the District Court. At the conclusion of that case he directed the District Court on remand to determine whether past discrimination was intentional and apparently find favorably toward the plan if so proven. Although according to *Baker* v *City of Detroit, supra*, a number of 6th Circuit decisions have established the theory that one intends the natural and foreseeable consequences of one's actions and where the natural and foreseeable results are discriminatory, a presumption of discriminatory intent arises — see *Oliver* v *Michigan State Board of Education*, 508 F 2d 178, 182 (1974) cert den, 421 US 963, re-affirmed; *NAACP* v *Lansing Board of Education*, 559 F 2d 1042 (1977) cert den 434 US 997 — it appears that the Supreme Court has restricted this theory. It did recognize, however, that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose —" (*Dayton Board of Education* v *Brinkman*, 99 S Ct 2971, 2978

(1979)), and according to *Baker* allowed the finder of fact to draw an inference of segregative intent from acts which are foreseeably discriminatory. *See Columbus Board of Education* v *Penick*, ____ US ____, 61 L Ed 2d 666, 99 S Ct 2041, 2950 (1979). This Court has no reason to believe that the City of Flint was guilty of furtively and affirmatively carrying on personnel practices which would discriminate against blacks. On the other hand, it can and does infer that its failure to recognize the population trends and its failure to adjust the policies to adapt its work force accordingly had the foreseeable consequence of discrimination.

On this basis this Court holds that the plan adopted by the Defendants was not violative of the provisions of the U.S. Constitution.

To follow further Circuit Judge Lively's instructions on remand in *DPOA* v *Young*, *supra*, the Court must address itself specifically to the "equal protection" clause and determine whether the plan adopted was a "reasonable remedial response." Returning to *Weber* v *Kaiser Aluminum*, *supra*, and its apparent criteria for a "reasonable remedial response" by a private employer and applying it to a public employer this Court finds that the Defendant's affirmative action plan does not (1) require the discharge of white employees and their replacement by new black hires, (2) nor create an absolute bar to advancement of white employees and (3) nor provide a permanent plan to maintain racial balance, but rather provides for a temporary measure to be ended when black sergeants become 15% of all sergeants on the force or at the end of 5 years. In the same frame the plan is clearly one intended to break down all patterns of racial segregation and to "open employment opportunities for Negroes in occupations which have been traditionally closed to them." The plan here, then, was a "reasonable remedial response."

Appendix M

Turning then to the remaining claimed violation of 42 USC 1983 the Court must recognize that the purpose of that statute is to afford a remedy to those persons who claim to have been deprived of their rights, privileges and immunities as secured by the Fourteenth Amendment to the U.S. Constitution. *See Monroe* v *Pape*, 365 US 167, 180; 6 L Ed 2d 492; 81 S Ct 473 (1961); *Jones* v *Bombeck*, 375 F 2d 737, 738 (CA 3, 1967); *Speare* v *Robinson*, 431 F 2d 1089, 1091 (CA 8, 1970). Therefore, inasmuch as this Court has heretofore made a finding that the Plaintiffs have not proven a deprivation of any of their Constitutional rights by the terms of the Consent Judgment, there is no remedy which the Plaintiffs may avail themselves of under this Section of the U.S. Code.

The last remaining claim of Plaintiffs is a claimed violation of the Michigan Fair Employment Practices Act, MCLA 423.301 et seq, MSA 17.458(301). As Circuit Judge Keith sitting as District Judge in the *Baker* case pointed out, this Act prohibits racial discrimination in a manner parallel with Title VII as referred to above. In interpreting this Act the decisions of the state courts have followed the principles laid out in federal decisions treating with Title VII cases. See *Civil Rights Commission* v *Chrysler*, 80 Mich App 368, 375 n 4 (1977). Therefore, it is probable that the state courts would continue to be persuaded by the U.S. Supreme Court's holding in the *Weber* case in interpreting the state law. In fact, as Circuit Judge Keith pointed out, this view is supported by the fact that the Michigan Civil Rights Act of 1977, MCLA 37.2210 went even further than the federal statute on the subject by specifically providing that a plan is permitted which would "eliminate present effects of past discriminatory practices or assure equal opportunity with respect to — race" if filed with the Civil Rights Commission.

Appendix M

Therefore, it is respectfully recommended to the U. S. District Court that a judgment be entered in favor of Defendants denying Plaintiffs' claim for relief in the form of a permanent injunction and denying Plaintiffs' prayer for appointment to the rank of sergeant with back pay and denying any other retroactive benefits the Plaintiffs have claimed.

/s/ HARVEY D. WALKER

HARVEY D. WALKER
United States Magistrate

Dated: March 4, 1980.

Appendix M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

TOM WALDRON II, et al.,
Plaintiffs,

v NO: 75-40084

FLINT POLICE PATROLMEN'S ASSOCIATION, et al.,
Defendants.

_____ /

ORDER

At a session of said Court, held in the Federal Building, Flint, Michigan on September 25, 1981.

PRESENT: HONORABLE
STEWART A. NEWBLATT
United States District Judge

At a hearing on September 25, 1981, this Court considered the objections to Magistrate Harvey D. Walker's Opinion and Recommendation of March 4, 1980. For the reasons set out on the record, the objections are DENIED. This Court hereby adopts Magistrate Walker's recommendation that judgment be entered for Defendants, and that Plaintiffs' prayer for injunctive and legal relief be DENIED.

IT IS SO ORDERED.

/s/ STEWART A. NEWBLATT
STEWART A. NEWBLATT
UNITED STATES DISTRICT JUDGE

Dated: 9/28/81

Appendix M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

TOM WALDRON II, et al.,
Plaintiffs,

v.

FLINT POLICE PATROLMEN'S ASSOCIATION, et al.,
Defendants.

CIVIL ACTION
No. 75-40084

_____ /

JUDGMENT

This action came on for hearing before the Court, Honorable Stewart A. Newblatt, District Judge, and the issues having been duly heard and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that judgment be entered for defendants, that the plaintiffs take nothing and that this action be dismissed.

Dated: September 29, 1981

JOHN P. MAYER, CLERK

BY: /s/ RUTH A. JOZWIAK
Ruth A. Jozwiak,
Deputy Clerk

TO:

Bruce A. Newman
1000 Beach Street
Flint, MI 48502

Brian M. Barkey
G-4415 Corunna Road
Flint, MI 48504

Richard Drew
720 Church Street
Flint, MI 48502

William R. Coppel
703 S. Grand Traverse
Flint, MI 48502

John S. Williamson
211 W. Wisconsin
Milwaukee, Wisconsin 54203

Appendix N

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

FLINT POLICE PATROLMENS ASSOCIATION, A Voluntary Unincorporated Association,
Plaintiff,

v

CITY OF FLINT,
A Municipal Corporation,
Defendant.

NO. 74-33234-CL
Philip C. Elliott P-13156
STIPULATION AND MOTION FOR DISMISSAL

/

Whereas, this cause was instituted by Plaintiffs herein for the purpose of challenging the propriety of the City's action in making provisional appointments within the Department of Public Safety, Division of Police, and this Court having issued an injunction relative to further such provisional appointments pending a hearing and final determination of this Court upon the merits of this cause, and

Whereas, the parties having subsequently met and negotiated in accordance with the provisions of the Public Employment Relations Act, Act 336 of the Public Acts of 1947, as amended, and in accordance with the recommendation of this Court, and

Whereas, the parties have successfully reached accord relative to said dispute,

Now, therefore, the parties hereto jointly move that this cause be dismissed without prejudice in accordance with the stipulation of the parties having been agreed to and attached hereto and made a part of this motion by reference thereto.

Appendix N

Further, the parties pray that this Court retain jurisdiction over said matter during the duration of said agreement and stipulation to insure enforcement thereof in the event of further dispute relative thereto.

/s/ DOUG KORNEY (DK)

ATTORNEY FOR PLAINTIFF

/s/ PATRICK H. HYNES

PATRICK H. HYNES,
ATTORNEY FOR DEFENDANT

Dated: December 2, 1974

Patrick H. Hynes P15320
Attorney for Defendant
Room 307 City Hall
Flint, Michigan

Appendix N

EXHIBIT VI

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

FLINT POLICE PATROLMENS ASSOCIATION, A Voluntary unincorporated association,
Plaintiff,

v

CITY OF FLINT, A Municipal Corporation,
Defendant.

NO. 74-33234-CL
Philip C. Elliott P-13156
ORDER

/

At a session of said Court, held in the Courthouse in the City of Flint, in said County and State on the 2nd day of December, A.D. 1974.

PRESENT: The Honorable Philip C. Elliott, Circuit Judge

WHEREAS, the parties hereto have reached agreement as to the settlement of this cause,

IT IS HEREBY ORDERED that said action is hereby dismissed without prejudice in accordance with the terms of the stipulation of parties attached hereto and made a part of this order.

/s/ PHILIP C. ELLIOTT P-13156
Circuit Judge

Dated: December 2, 1974

Appendix N

EXHIBIT III

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF GENESEE

FLINT POLICE PATROLMEN'S ASSOCIATION, A Voluntary Unincorporated Association,
Plaintiff,

v.

CITY OF FLINT, A Municipal Corporation,
Defendant.

NO. 74-33234-CL
PHILIP C. ELLIOTT
AGREEMENT

/

Whereas, the parties hereto have reached agreement relative to the issues set forth in the pleadings previously filed herein,

Now, therefore, it is hereby agreed between the parties that the City of Flint shall promote Patrolmen to the rank of Sergeant in the following manner during the term of this Stipulation and Agreement:

1. The qualifications for writing the promotional examination from the position of Patrolman to the position of Sergeant shall be three years experience as Patrolman in the Department of Public Safety, Division of Police, and one year of college, or four years of experience as a Patrolman in the City of Flint, Division of Police.

2. Two separate promotional lists shall be maintained (one consisting of minorities as defined by Federal law, and

one of non-minorities) made up of those Patrolmen who successfully pass the promotional examination for Sergeant.

3. The scores on said promotional examination shall be used as the criteria for placement on said lists.

4. A maximum of 15 seniority points will be given to those passing the examination irrespective of the number of years an individual has on the force in excess of 15 years.

5. The present "Patrol Sergeant" eligibility list will be separated into two lists as referred to above and said lists shall be used as the basis of promotions to the position of Sergeant until September 30, 1975 at which time two other lists shall be established (minority — non-minority) in accordance with a validated examination to be established through normal testing procedures and conducted during the first week of June, 1975; the Plaintiffs herein agreeing to reasonably cooperate with the Civil Service Commission in the establishment of said validated testing procedure. A test will be given each two years during the first week of June during the term of this Stipulation and Agreement.

6. All present provisional Sergeants and those made hereafter from the present "Patrol Sergeant" eligibility list, and lists established hereafter in accordance with the terms of this agreement, shall be made permanent Sergeants.

7. For five years following the entrance of the order of this honorable court relative to this Stipulation and Agreement, or until such time as the number of minority positions of Sergeant in the Department of Public Safety, Division of Police shall reach fifteen percent, promotions will be made on the basis of one minority to four non-minorities (one out of every five). After five years, or the reaching of fifteen

percent minority Sergeants within the Division of Police, promotions will be made in numerical order from a single promotional list, regardless of race. Said promotional procedures shall apply only to first line promotions (Patrolmen to Sergeants).

8. Time limit on written promotional examinations for the position of Sergeant shall be doubled (i.e. tests ordinarily taking one and a half hours will be extended to three hours).

9. The City agrees that during the term of this Stipulation and Agreement, a minimum of 87 Sergeant positions shall be maintained and filled at all times in accordance with the terms provided herein.

Agreed upon this 22nd day of November, 1974, subject to ratification of the SAAP, FPPA and the City Council.

/s/

/s/

/s/

/s/

/s/

/s/

Appendix O

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN ALFARO, an individual; RICHARD DICKS, an individual; JAMES WASHINGTON, an individual; RAMONA JUAREZ, an individual; CABALLEROS DE SAN JUAN, Consul No. 100, a non-profit, unincorporated association; SOCIETY OF AFRO-AMERICAN POLICE OF FLINT, MICHIGAN, a non-profit, incorporated association; LA RAZA UNIDA, Consul No. 12, a non-profit, unincorporated association,

Plaintiffs,

v

GORDON SUBER, CARL E. MASON, WOODY ETHERLY, JR., GERALD J. YURK, FRED TUCKER, JOHN W. NORTHRUP, DOUGLAS M. PHILPOTT, FRANCIS E. LIMMER AND EDWARD E. LITTLE, each as City Councilmen of the City of Flint, Michigan; BRIAN RAPP, as City Manager of Flint, Michigan; FRANK M. PATITUCCI, Director of Flint Department of Community Development; OLNEY L. CRAFT, as Director of Finance for the City of Flint, Michigan; JAMES E. NORTHWAY, as Director and Executive Secretary of the Flint Civil Service Commission; LAWRENCE B. MURPHY, PAUL C. VISSER, and DR. VIVIAN LEWIS, as Members of the Flint Civil Service Commission; JACK R. JOHNSON, KENNETH M. WRIGHT, DONALD L. PHILLIPS, Local 1600 A.F.S.C.M.E., Local 825 A.F.S.C.M.E., Council 29 A.F.S.C.M.E.; FRATERNAL ORDER OF POLICE, Lodge 126, JOSEPH FARIS: and SECRETARY OF UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Defendants.

_____ /

CIVIL ACTION
NO: 613

MEMORANDUM OPINION AND ORDER

At a session of said court, held in the Federal Building, Flint, Michigan on May 18, 1977

PRESENT: HONORABLE JAMES HARVEY
United States District Judge

This is a civil rights action challenging the hiring and promotion practices and policies of the City of Flint and of the local unions who represent city employees. On May 6, 1976, the Court severed for trial that portion of this case which relates solely to the practices and policies regarding the Police Department of the City of Flint.

Appendix O

The case was filed on January 23, 1973, by the above named Black and Spanish surnamed or Spanish speaking Americans (SSA) seeking declaratory and injunctive relief and backpay on behalf of themselves and all others similarly situated. The Court determined that this action could proceed as a class action pursuant to FR Civ P 23(b), and certified the class of plaintiffs to consist of all past, present, and future Black and Spanish surnamed employees of the City of Flint and members of the defendant union who have been, continue to be, or may be adversely affected on the basis of race, color, or national origin with respect to various stated employment practices. The class representatives were determined to be the Society of Afro-American Police (SAAP), an organization made up largely of Black police officers, and its president, Richard Dicks, a police officer who alleges that he was denied promotions because of his race. Two other Spanish organizations which were also named as plaintiffs were denied standing in the courts' class action order. No other plaintiffs were alleged to have suffered discrimination in the Police Department.

The Court had initial reservations about certifying the class to consist of both Black and SSA persons. The only named plaintiffs who were found to have standing to represent the class were the SAAP organization and its president, creating the possibility that the SSA persons would not be adequately represented by the class representatives as required by FR Civ P 23(a)(4). However, because it was alleged that there were SSA persons in the SAAP organization, the Court found that the representation appeared adequate, and included the SSA persons within the class.

As a result of the proceedings in the trial of this cause, the Court finds that the representation of the SSA persons was not

adequate and that all SSA persons should be excluded from the class of plaintiffs.

Plaintiffs' case in chief was based in large part on demographic statistical evidence. This evidence may be compelling evidence of employment discrimination where the number of persons involved is large and the disparity in employment of a group of those persons is significant. However, as the group involved becomes smaller, the showing of disparity in employment must be correspondingly greater in order for any disparity to be significant evidence of discrimination.

In plaintiffs' case in chief, the evidence showed that the group of SSA persons are only 1.7% of the total population of the City of Flint. Plaintiffs' evidence of disparity in employment was that there is only one SSA police officer out of some 400 officers on the police force. The evidence, thus, does not show a significant statistical disparity, and despite this lack, only minimal if any testimonial evidence was introduced to support a finding of disparate impact.

Because of the failure to produce any significant evidence on behalf of SSA's and the likely res judicata effect of any finding by the Court, it would be an injustice for the Court to allow the class to proceed as originally drawn. Therefore, the Court hereby AMENDS the class as found on May 6, 1976, to include only past, present and future black employees of the City of Flint. Whether the remainder of the case remaining to be tried shall proceed as a single class or as subclasses, the Court will leave for later determination.

On the basis of the allegations of the Complaint, the Order certifying the class determined that the class would consist of those named class members who were adversely affected by

reason of race, color, or national origin with respect to the following claimed discriminatory employment practices:

1) Maintaining discriminatory and unvalidated entrance requirements including

a. educational requirements

b. experimental requirements

c. personal credit and character record.

2) Using discriminatory unlawful and unvalidated tests;

3) Maintaining discriminatory and unvalidated time in grade requirements for promotions;

4) Failing to implement affirmative action to remedy past discrimination;

5) Failing to represent fairly the employment rights of Blacks and Spanish surnamed members by acquiescing to the defendant City's discriminatory practices; and

6) Obstructing and opposing the implementation of affirmative action.

In addition to these practices, plaintiffs seek to challenge three other alleged discriminatory practices in their post-trial brief. These additional practices are:

1) The selection of police officers based upon their relative rank on the eligibility list;

2) The use of the "Rule of Three" in selecting officers;

3) The use of recruitment procedures which result in few minority applicants.

Evidence was admitted on all three of these practices without objection from opposing counsel. Defendants also have not sought

to oppose the inclusion of these practices in their post-trial brief. Therefore, the Court hereby AMENDS the order allowing this action to proceed as a class action and the Complaint in this cause by including these alleged discriminatory practices.

There is one additional issue which the Court will consider in the context of the trial of this cause, that being the validity of the promotion of eleven persons from the position of sergeant to that of lieutenant. On February 12, 1976, the Court entered an order temporarily restraining the City from effecting any such promotions on the basis of an eligibility list made up from the 1975 lieutenant's examination. Nevertheless, the eleven promotions were made from that list, either immediately before or immediately after the order was signed. Plaintiffs assert that these promotions were made after the restraining order was signed. Plaintiffs assert further that the promotions were made in contravention of the Civil Service Rules. Both of these grounds for invalidity will be considered.

Two matters pertaining to this suit were resolved by motion just prior to or during the trial of this cause. The persons who had been promoted to the position of lieutenant, who had been allowed to intervene because of the challenge to the validity of their promotions, indicated to the Court immediately prior to trial that they believed that their interests were adequately protected by the City of Flint. Accordingly, they sought to withdraw from their status of intervenor-plaintiffs and this motion was granted.

At the close of plaintiffs' proofs, Mr. Joseph Faris, former President of defendant Union FOP, Local 126, moved for a directed verdict on the issue of his liability as an individual as opposed to his liability as Union President. As no evidence was introduced that Mr. Joseph Faris in his individual capacity discriminated against the plaintiffs, his motion was granted.

Appendix O

This cause having come on for trial, and the Court having heard the testimony of the witnesses and received the exhibits into evidence, and after complete consideration of all the matters at issue therein, the Court, pursuant to FR Civ P 52(a), makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The population in the City of Flint for the years 1960, 1970, and 1974 has been approximately 190,000, 193,000, and 187,000 persons respectively. During those years, the percentage of Black persons in Flint has been approximately 17%, 28%, and 34%.

2. Prior to 1973, the Flint Police Department never employed more than twelve black persons at one time and in the entire history of Flint, a total of only twenty-four Blacks had ever been hired.

3. In 1971, out of a total of 367 uniformed officers, ten were Black.

4. In 1974, out of a total of 395 uniformed police officers, thirty were minorities (8%). No evidence was submitted as to what proportion were Black.

5. From 1971 to 1975, minority hires has proceeded at the following rates:

Year	Total Hires	Minority Hires	%
1971-1972	20	7	35
1972-1973	29	15	52
1973-1974	8	2	25
1974-1975	105	56	53
Total	162	80	49

Appendix O

No evidence was submitted as to what proportion of these minorities were Black.

6. At the present time, approximately ---ty-seven of 450 uniformed police are Black.

7. The only evidence submitted of relative rejection rates in hiring was exhibit #27 which, for January, 1973, showed:

	Total	Minority
Attempted to Apply	285	140
Applications Accepted	123	65
Submitted to Oral Exam	95	49
Passed Oral Exam	48	24
Eligible for Appointment	43	19
Appointed	20	12

8. Subsequent to 1972 all hiring with the exception of fifteen or sixteen persons has been with Federal Funding through the Emergency Employment Act (EEA) and the Comprehensive Employment & Training Act (CETA) fund grants.

9. Prior to 1973, appointment to entry level positions were based upon the following criteria. The applicant had to 1) satisfy minimum entry standards, 2) pass a written examination, 3) pass a background investigation as to character and moral fitness, 4) satisfy minimum requirements on an agility test, and 5) pass an oral interview. The applicant was then ranked on the basis of the written examination and oral interview and placed on an eligibility list. Appointments were made according to the "Rule of Three" by the Chief of Police.

10. On January 3, 1973, the Honorable Thomas P. Thornton, sitting in this Court by designation on the case of *Holliman* v *Price*, Civil Action No. 575, issued an order enjoining the city from using the entry level examination, requiring college credits

or experience and all other non-validated entry level requirements in the hiring of persons under federally funded programs. Since that time, no entry level exam has been given. The applicants are rated solely upon scores received on the oral interview. The oral interviews are conducted by a panel consisting of white and black police officers.

11. From 1969 to 1971, the following minimum entrance requirements were in effect:

1. Twelfth-grade education and sixty semester hours of college credit in police administration or a related field or law enforcement experience.

2. 20/30 vision corrected to 20/20.

3. Normal hearing.

4. No serious defects of the members.

5. Eighteen to thirty-four years of age.

6. A valid driver's license.

12. From 1971 to 1973, the educational requirements were changed to require high school or G.E.D.; sixty hours of college credit in police administration or a related field or two years experience as a law enforcement officer or comparable military occupational specialty. Additionally, applicants were required to be a U. S. citizen and 5'9" in height with weight in proportion to height.

13. From 1973 to the present an applicant was required to be:

1. Unemployed or underemployed.

2. A U. S. citizen (deleted in April of 1973)

3. Height, 5'9" (deleted in April of 1973)

4. 20/30 vision corrected to 20/20

5. Normal hearing.

6. High School Graduate or G.E.D.

7. Valid drivers license.

14. Evidence of disparate impact because of the educational requirement is minimal. No single person was shown to have been denied employment because of the educational requirement. Evidence was introduced that in Michigan in 1970, 6.8% of the Blacks would have had the minimum educational requirements as opposed to 10% of the Whites. Additionally, police officer Richard Dicks testified that his investigation of census tracts showed that in 1970, 4,774 males in Flint between the ages of 21 and 34 had the prerequisite educational requirements and 329 of those persons were Black. It is not known how he arrived at these figures. However, defendants have not challenged their validity.

While these figures are not in themselves overwhelming, the Court recognizes the difficulty in determining the relative rejection rates of Whites and Blacks as they relate to the minimum entrance requirements and the resulting disparate impact. The testimony of Lynn Carson, the City's former Equal Employment Opportunity Officer, revealed that applicants who did not satisfy minimum entrance requirements were not given applications and no records were kept of their rejection rate. Despite the lack of overwhelming proof the Court finds that plaintiffs have sufficiently established a prima facie showing of disparate impact.

15. The defendants have attempted to show that college experience would be helpful and desirable in up-grading the quality of police performance. However, this evidence is strongly rebutted by a study done by the City in 1972 which showed

college education having no demonstrable relationship to police performance.

16. A background investigation is conducted by the police department on each applicant to determine his character and fitness. The investigating officers consider among other things, the applicant's arrest or arrest and conviction record, his credit standing and his character. No standards were ever published nor was instruction ever given to the investigating officers as to what criteria would be disqualifying. Instead, the officers were left to their subjective judgments.

Upon completion of the investigation, the officers submitted a written report stating their findings and conclusions. The report was then reviewed by the Board of Interviewers and the Chief of Police. The reviewing officers would generally follow the investigators' recommendations as to acceptance or rejection of the applicant.

Prior to 1973, the investigations were conducted solely by White officers. After that time, a Black officer was assigned with a White officer to conduct the investigation.

Plaintiffs challenge the following criteria which they consider to be disqualifying and as having a disparate impact: credit references which have a disparate effect because Blacks generally have a lower income; associating with known criminals because Blacks associate freely without regard to social or class distinction; being discharged from employment because Blacks have a higher discharge rate, and finally, having an arrest record.

Because of the lack of objective criteria or guiding standards, it is difficult to determine what factors were considered by the investigating officers or to determine if Blacks were actually

denied employment because they failed to satisfy any of the criteria.

It does appear clear that, at least prior to 1972, mere arrests were considered disqualifying and that Blacks were arrested at a higher rate than White persons. It is not clear from the conflicting testimony whether arrests would still at this time be disqualifying. Defendants have made no showing that the arrest requirement was job related.

17. Prior to the EEA recruitment which resulted in the 1973 hirings, the police department had little success in recruiting minority applicants. Plaintiffs' exhibit #26 describes in brief the recruitment efforts in 1960, 1965, 1969, 1970, 1971, and 1973. With the exception of the recruitment in 1973, none of these efforts produced any substantial hiring of Blacks. Various factors were identified through testimony as contributing to the poor results in recruiting from the minority community. The major factors were the lack of distribution of information relating to job openings in the Police Department in the minority community, the low esteem of police officers by Blacks following the rioting in the 1960's; the lack of prospects for promotion of Blacks in the department and the stringent entrance requirements. Most of these difficulties were overcome in the EEA recruitment by liberalizing the entrance requirements, by the active use of Black police officers in recruiting, and by the wider distribution of information directed toward minority recruitment.

18. When applicants have successfully completed the entry requirements they are ranked according to their relative score on the entry examination and the oral interview (or just oral interview after 1973) and certified to the Chief of Police for appointment according to the "Rule of Three". The "Rule of Three" is imposed by the City's Charter 246-A which requires that the

appointing officers choose one of the top three scoring applicants for any single opening.

Lynn Carson testified that because Black applicants often had lower scores, he was obligated to recruit more Blacks and thus "front load" the system to assure higher statistical representation of Blacks to overcome the existing numerical disparity existing the Police Department. No evidence was introduced showing any statistical disparity in the rejection or selection rates caused by the "Rule of Three".

19. Prior to September 25, 1974, no minority had ever been permanently promoted to a position above the initial entry level.

20. Permanent promotions are made according to the Civil Service merit system wherein the candidates are ranked by the score they receive on a written examination plus points granted for each year of seniority. To be considered for promotion, the candidate must achieve a minimum score of 70 exclusive of seniority points. Each test and the eligibility list made from that test were in effect for two years. At the end of that period a new test and eligibility list were promulgated.

21. In October of 1970 a detective examination was given to 158 persons including four Blacks. Thirty-eight White officers and no Black officers passed the examination. Richard Dicks, one of the named plaintiffs, was one of the Blacks who failed to achieve a passing grade of 70. The Civil Service officer making the test testified that he attempted to make the test job related, but because of the state of art of making tests at that time, there may be some question of its validity by present standards.

22. On August 3, 1973, an examination was given to 229 persons for promotion to Sergeant. Seven Blacks took the examination and all passed. 86.90% of the Whites who took the

examination passed. The average score for White candidates was 78.73 with a standard deviation of 7.12. The average score for Black candidates was 78.28 with a standard deviation of 4.07. The testimony of defendants' expert, Dr. Frederick O. Carleton was that the differences in scores were not statistically significant. Plaintiffs' expert testified that the minority sampling was too small to be predictive.

Following the examination an eligibility list was promulgated and the Blacks taking the examination ranked 91, 137, 156, 162, 163, 166, 181. Based solely on the test score without seniority points added, the Blacks would have ranked 36, 106, 135, 136, 147, 173.

Following the publishing of the eligibility list, a suit was started in state circuit court by the Flint Police Patrolmen's Association to enjoin promotions from the list. Pursuant to a stipulated agreement between the City of Flint, the FPPA and SAAP and signed November 22, 1974, minorities were thereafter promoted to sergeant on the following basis:

1. The qualifications for writing the promotional examination from the position of Patrolman to the position of Sergeant became three years experience as Patrolman in the Department of Public Safety, Division of Police, and one year of college, or four years of experience as a Patrolman in the City of Flint, Division of Police.

2. Two separate promotional lists were maintained (one consisting of minorities as defined by Federal law, and one of non-minorities) made up of those Patrolmen who successfully passed the promotional examination for Sergeant.

3. The scores on said promotional examination were used as the criteria for placement on said lists.

Appendix O

4. A maximum of fifteen seniority points were given to those passing the examination irrespective of the number of years an individual had on the force in excess of fifteen years.

5. The present "Patrol Sergeant" eligibility list was separated into two lists as referred to above and said lists were used as the basis of promotions to the position of Sergeant until September 30, 1975, at which time two other lists were to be established (minority – non-minority), which was to be done in accordance with a validated examination to be established through normal testing procedures and conducted during the first week of June, 1975; and the plaintiffs in the Circuit Court action agreed to reasonably cooperate with the Civil Service Commission in the establishment of said validated testing procedure. A test was to be given each two years during the first week of June during the term of the Stipulation and Agreement.

6. All of the then present provisional Sergeants and those made thereafter from then present "Patrol Sergeant" eligibility list, and lists established thereafter in accordance with the terms of the agreement, were made permanent Sergeants.

7. For five years following the entrance of the order of the Circuit Court relative to the Stipulation and Agreement, or until such time as the number of minority positions of Sergeant in the Department of Public Safety, Division of Police, had reached fifteen percent, promotions were made on the basis of one minority to four non-minorities (one out of every five). After five years, or the reaching of fifteen percent minority Sergeants within the Division of Police, promotions were to be made in numerical order from a single promotional list, regardless of race. Said promotional procedures applied only to first line promotions (Patrolmen to Sergeants).

Appendix O

8. Time limits on written promotional examinations for the position of Sergeant were doubled (i.e. tests ordinarily taking one and one half hours were extended to three hours).

9. A minimum of 87 Sergeant positions were to be maintained and filled by the City.

23. Five Blacks were promoted to sergeant on 9/25/74. Richard Dicks was so promoted on 2/4/74, a seventh Black was so promoted on 12/22/74.

24. On June 5, 1975, a second examination was given to 180 persons for promotion to sergeant. 138 White officers passed the exam and three of four Blacks taking the examination passed. On the basis of the stipulated agreement, all three Blacks were promoted. The median score for Blacks and Whites was 76.34.

25. On 12/17/75 a test was given to establish an eligibility list for police lieutenants. The candidates were divided into two groups per court order issuing out of a state court action. One group was comprised of "old sergeants" who were former detectives promoted to sergeant when the job classification of detective was abolished by the civil service. The second group included new sergeants who were promoted as a result of the 1973 sergeants examination. The new sergeants had forty-nine White candidates who had an average score of 71.73 and a standard deviation of 8.55. Five Black candidates included among the new sergeants had an average score of 67.6 with a standard deviation of 5.94. The twenty-five old sergeants who took the test had an average score of 74.72 with a standard deviation of 10.78. A total of eleven Whites and no Blacks passed the examination.

26. The 1975 lieutenant's examination was weighted approximately 32% toward testing criminal investigation. No Blacks had more than six months experience in a section using criminal

investigation. Most of the experience of the Black candidates had been in the patrol division. Of the eleven persons promoted from the examination, ten had detective experience in the criminal division.

27. Because of the difficulties in obtaining a large enough sample, the validation requirement for the test was attempted to be met by the use of content validation. The relative weight given to the different elements tested was determined by a panel of police captains and lieutenants. All but one of the lieutenants and all of the captains had backgrounds as detectives.

28. Since 1968, each bargaining unit within the City of Flint conducted its own negotiations. The Fraternal Order of Police (FOP), Local 126, represented all police officers at that time. Negotiations were conducted on an informal basis without a collective bargaining agreement until approximately late 1974. At that time, the FOP no longer represented any bargaining unit. The FOP is now made up of retired and present police officers and continues largely as a social organization.

The position of the FOP as a bargaining agent is unclear. From 1968 to 1973, various groups made up of individuals in different promotional levels splintered off to form their own bargaining units. Plaintiffs' introduced into evidence a draft of a collective bargaining agreement for 1973 which showed the Flint Police Patrolmen's Association as the bargaining agent but which still left the FOP with substantial powers in bargaining. There is no evidence this agreement was ever implemented.

Evidence was submitted that the FOP approved of the college requirement for entry level officers. No evidence was admitted that this requirement was ever bargained for by the FOP or was capable of being bargained for.

Appendix O

29. In 1973, the City employed a testing expert, Dr. Franks, to validate its entrance level examinations. Members of the FOP actively opposed the validation effort as a means for affirmative action. Floyd Jackson, the President of FOP, sent a letter to the FOP members asking that they not cooperate with the validation effort. He also took and refused to return a number of officer evaluation sheets that were to be used to validate the examination.

Also in 1973, police officers who were also members of FOP picketed the Flint City Hall in protest of sixteen provisional appointments to sergeant, two of whom were Black. There is no showing that this was done with the sanction of the FOP, or that the picketing caused the promotions to be rescinded.

30. No evidence was received on the experience requirement for hiring.

31. No evidence was received on any disparate impact resulting from the entry level examination.

32. To be eligible to take the sergeants examination, a candidate was required to have three years experience and one year of college or four years experience. To take the 1975 lieutenants examination, the applicant must have had five years experience in the Flint Police Department, the last having been as a sergeant and seventy-five semester credit hours of college in police administration. Two years of experience could be substituted for the college credit. Plaintiffs allege that the time in grade requirement acts to perpetuate the past discrimination. Neither party has offered any substantial testimony as to what an appropriate time in grade requirement should be.

33. On February 12, 1976, the plaintiffs filed a motion and the Court signed an order for a temporary restraining order

enjoining the Police Department from making appointments from the eligibility list made from the 1975 lieutenants' examination. The order was signed at 4:42 p.m. The effective date of the promotion was 12:01 p.m., February 12, 1976. In his motion to grant the temporary restraining order, plaintiffs claimed that the promotions were invalid because they did not comply with Civil Service Commission Rule 7.12 which states that scored written examination sheets shall be available for review by candidates for a period of five days immediately following the day of mailing the grade notices. Additionally, plaintiffs' exhibit #5 shows that the Finance Department had a long standing rule requiring promotions to become effective at the beginning of the pay period unless exceptions were approved by the Department of Finance. There is also testimony that the procedure followed in making the appointments was shorter than usual.

34. Plaintiffs have failed to show that the defendants conspired together to deprive the plaintiffs of their rights. Therefore, relief under 42 USC 1985(3) is inappropriate.

CONCLUSIONS OF LAW

1. Named plaintiffs in this case are employees as defined by 42 USC 2000e(b).

2. Named defendants, city employers, are employers as defined by 42 USC 2000e(b).

3. Defendant FOP Local 126 is a labor organization as defined by 42 USC 2000e(d).

4. This Court has jurisdiction under 28 USC 1331 and 1343, and 42 USC 2000e(5)(f)(3).

5. Under *Griggs* v *Duke Power Co*, 401 US 424 (1970), a prima facie case in Title VII cases is made where the criteria used

for hiring or promotion operates to select applicants in a racial pattern significantly different from the pool of applicants. In order to sustain a finding of discrimination under Title VII, it is unnecessary for the Court to find discriminary intent. Practices which are neutral on their face but which have a disparate effect on minorities are proscribed.

By amendment to Title VII on March 3, 1972, the Act became applicable to governmental bodies. The Act has no retroactive effect on practices in effect prior to the amendment. *Popkin* v *NY State Health & Mental Hygiene,* 547 F2d 18 (CA 2, 1976). However, plaintiffs have brought their action under the Fifth and Fourteenth Amendments to the Constitution and 42 USC 1981, 1983, 1985(3) as well as Title VII. Although the Court certified the class in terms of Title VII, they would be entitled to proceed under the other statutes and the Constitution on behalf of their class. The effect is to extend liability for their acts back to the three years preceding the filing of the complaint encompassed by the applicable statutes of limitation.

6. The gross disparity between employment levels of Black and White persons prior to 1973 as shown by statistics is compelling evidence that the employment practices in the Police Department have had a discriminatory impact. The defendants' evidence that they were caused solely by the lack of success in recruitment is insufficient.

7. The statistical evidence of the impact of the educational requirements is not overwhelming. However, it is sufficient to sustain plaintiff's burden of proof, particularly in light of the substantial increase in applicants and minority hires when the requirement was removed. The defendants have failed to show the requirement was job related. Therefore, the Court finds that it is subject to remedial relief.

Appendix O

8. As the court noted in its findings of fact, the background investigation was largely guided by the subjective standards of the investigating officers. In *Senter* v *General Motors Corp,* 532 F2d 511 (CA 6, 1976), the Court said:

> "Placing too great an emphasis on subjective evaluations in employment decisions tends to favor the incumbent class at the expense of the minority."

Given the fact that until 1973, the investigations were conducted by White officers and also given the great disparity in the hiring of Blacks, the Court believes it is warranted in finding that plaintiffs have established a prima facie case. Defendants have failed to rebut the prima facie case. Therefore, relief is appropriate.

9. The selection procedures by rank and use of the "Rule of Three" have not by themselves been shown to have a disparate impact. Sufficient evidence is lacking. While plaintiffs have failed to sustain their burden of proof, if in the future the circumstances require affirmative relief, these procedures may well have to be changed. However, at this time relief is not warranted.

10. The evidence is insufficient to sustain a finding that minority recruitment, given the minimum entry level standards, was so lacking as to be discriminatory.

As the Court noted in its findings of fact, a number of factors affected the rate of recruitment. The changes in hiring standards after 1973 necessarily dictated a change in recruitment techniques which should show better results than had been shown in the past. The Court therefore finds plaintiffs have failed to sustain their burden of proof.

11. The statistics submitted on the 1970 sergeants examination do not establish disparate impact. The statistical sample is

too small to develop any rational conclusion. See *Bridgeport Guardians Inc* v *Bridgeport Civil Service Comm,* 482 F2d 1333 (CA 2, 1973). Plaintiffs in their post-trial brief attempt to develop a relevant statistical sample by combining the pass-fail rates on all promotional tests given. The Court does not believe this provides sufficient probative proof. Each test was separately developed with different examination questions. There is slight, if any basis, for comparison. The Court finds no basis for relief on the 1970 examination.

12. The 1973 and 1975 sergeants examination were not shown to have a statistically significant disparity. The critical issue in promotional devices is the disparate rate of selection. The statistical sample was small, making the conclusions of disparate impact suspect. Furthermore, corroborative evidence of disparity such as, for example, the average score of candidates was lacking. The Court finds no basis for relief.

13. The 1975 Lieutenants examination showed a stronger statistical disparity in selection rates and pass-fail rates. While here, as in the other examinations, the statistical sample was small, plaintiffs did provide sufficient corroborative evidence of disparity to sustain their burden of proof. The heavy weighting of the test toward criminal investigation coupled with the lack of experience by Blacks in jobs using criminal investigation tends to support plaintiffs' assertions.

14. Once a showing of disparate impact is shown, the employer has the burden of showing that the test has a manifest relationship to the employment in question. The EEOC has issued "Guidelines" for employers seeking to determine, through professional validation studies, whether their employment tests are job related. These guidelines draw upon and make reference to professional standards of test validation established by the

American Psychological Association. *Albermarle Paper Co* v *Moody,* 422 US 405, 430, 431, 95 S Ct 2362, 45 L Ed 2d 280 (1975). The Guidelines are "entitled to great deference." *Griggs* v *Duke Power Co,* 401 US at 433-434, 28 L Ed 2d 158.

Discriminatory tests are impermissible unless shown, by professionally acceptable methods, to be "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." *Albermarle Paper Co* v *Moody, supra,* at 431.

The defendants sought to establish the job relatedness of the examinations by showing that it was content validated. Content validation requires that the aptitudes and skills required for successful examination performance must be those aptitudes and skills required for successful job performance. *Vulcan Soc of NY City Fire Dept Inc* v *Civil Service Commission,* 490 F2d 387 (CA 2, 1973). For an examination to be content valid, it is necessary to have an adequate job analysis in preparing the examination.

Because the panel of officers used to determine the skills necessary to do the job was heavily weighted toward criminal investigation, their concept of a lieutenant's job was similarly weighted in the same direction, resulting in a strong emphasis on criminal investigation.

The testimony at trial supports plaintiffs' contention that only a limited number of the lieutenants work directly with or use criminal investigations. Thus, it was shown that the job analysis was insufficient and that the test did not adequately measure the applicant for the job.

Appendix O

The Court finds that the defendant has not established the validity of the examination and that relief is appropriate.

Accordingly, the Court will enjoin the City of Flint from appointing any person from the eligibility list which was made from the 1975 Lieutenant's examination.

The Court will not award back pay to any plaintiff because of the 1975 Lieutenant's examination as there was no evidence that any individual was denied promotion because of the use of the test.

15. Because of defendant City's failure to hire Black persons in any substantial numbers prior to 1973, the unlimited use of seniority points in compiling eligibility lists for promotion acts to perpetuate the effects of past discrimination. *EEOC* v *Detroit Edison Co,* 515 F2d 301 (CA 6, 1975). Therefore, the unlimited use of seniority points is appropriate for relief. Evidence showed that a relevant use of seniority points would be five years, and the Court will, therefore, enjoin the City from considering any more than five years seniority in compiling eligibility lists for promotion.

16. There has been no showing that any individual was actually denied promotion as a result of the unlimited use of seniority points in compiling eligibility lists for promotion.

After November 22, 1974, all Blacks were promoted by stipulation; and there was no evidence as to when any Black would otherwise have been promoted.

Accordingly, the Court finds that no individual is entitled to back pay as a result of the unlimited use of seniority points.

17. There has been no showing by the defendant FOP that it ever attempted to change any of the employment practices of the City of Flint which have had a disparate impact on Blacks or

other minorities. Instead, it is apparent that the union has opposed efforts by the City to implement affirmative action.

A union has an obligation to assert the rights of its minority members in collective bargaining sessions and not to passively accept practices which discriminate against them. *EEOC* v *Detroit Edison, supra.* Acquiescence in a departmental seniority system which produces unequal treatment on the basis of race is sufficient to subject a union to liability under Title VII. *Johnson* v *Goodyear Tire & Rubber Co,* 491 F2d 1364, 1381 (CA 5, 1974).

There is little question that the FOP, as bargaining agent, had the power and the authority to limit the use of seniority points. This, however, does not provide a basis for relief. The Court has found that back pay on this basis in inappropriate. Likewise, no other damages have been proven. As FOP is no longer the bargaining agent, injunctive relief is also inappropriate.

A more difficult question is whether FOP should bear responsibility for the discriminatory entrance level requirements. The Court finds that it should not. Plaintiffs have failed to show that entrance or hiring level requirements were a subject validly within the scope of collective bargaining. The only relevant evidence in this regard was that the entrance level requirements were developed by the Civil Service Commission and the Chief of Police.

Accordingly, the court finds that plaintiffs have failed to prove the required nexus between prohibited behavior and injuries for which back pay is sought from defendant. See *Myers* v *Gilman Paper Corp,* 544 F2d 837 (CA 5, 1977).

Plaintiffs in their complaint also seek relief from the overt act done by FOP members in opposition to the cities affirmative action program. However, there is no showing that such acts had

any effect in the hiring or promotion of Blacks. Accordingly, the Court finds no basis for assessing damages. As FOP is no longer the bargaining agent, injunctive relief against FOP members would also be inappropriate.

18. The Court finds that plaintiffs have not sustained their burden of proving that the promotions made on February 12, 1976, were invalid. Plaintiffs have failed to file any post-trial brief on the issue or to file any pleadings relating to that issue beyond those filed for the temporary restraining order. However, beyond that, plaintiff has not shown that the procedure followed violates any Civil Service rule. Exhibit #5 referred to in the findings of fact also fails to show that the promotions would be invalid. The rule referred to in the memo from the financial department has not been shown to be a Civil Service rule or that a violation of that rule would void the promotions. While the testimony showed the procedure followed was unusual, there was no showing that it was invalid. Therefore, the Court will not displace the lieutenants already promoted.

19. The Court does not find it necessary to eliminate or alter the time in grade requirements. The evidence of the change in polices and resulting increase in minority hires beginning in 1973 would now, four years later, allow those minorities to become eligible for promotion. The Court finds that relief, therefore, is not appropriate.

RELIEF

1. The City of Flint is hereby enjoined from requiring college credits as a minimum entry level requirement.

2. The City of Flint shall promulgate written standards with relevant criteria for conducting background investigations, to be

submitted within six months to opposing counsel and to the Court.

3. The City of Flint is permanently enjoined from appointing any person from the eligibility list which was made from the 1975 Lieutenants examination.

4. From the evidence received at trial, it is apparent that prior to 1973, the hiring of Blacks and other minorities was grossly out of proportion to their representation in the community, which has led the Court to conclude that those practices were discriminatory. Since that time, it is also apparent that the City has attempted to remedy many of the practices which caused the disparate impact and has since increased minority representation in the Police Department. Whether those gains have been the result of court action or pressures from federal funding agencies is not entirely certain.

Because of the general improvement in minority representation in the last three and one-half years, the Court does not believe that imposition of a quota for hiring is necessary. However, to assure that improvement continues, the Court will retain jurisdiction of the case for five years. During that period, the City is ordered to compile a list every six months of those persons hired by the Police Department according to race and to submit the list to opposing counsel and to the Court.

5. The City of Flint shall submit to the Court within two weeks of this decision a list setting forth the total number of police officers and their race.

6. Both the plaintiffs and the defendant City shall submit to the Court within two weeks of this decision a single proposal for determining persons eligible for back pay because of their

exclusion from hiring by reason of their failure to meet educational standards or the background investigation.

7. The City of Flint is enjoined from considering any more than five years seniority in compiling eligibility lists for promotions.

8. All injunctive relief against defendant City of Flint shall apply to said city, its officials, employees, agents, and representatives in whatever capacity.

9. Defendant City of Flint and defendant Fraternal Order of Police shall pay to the private plaintiffs their reasonable attorneys' fees.

10. Defendant Joseph Faris has written a letter to the Court requesting an award for attorneys fees. The Court will consider the issue when a proper motion is filed.

For the reasons set forth herein, the claims for relief are hereby GRANTED as set forth above and all other claims for relief are DENIED.

IT IS SO ORDERED.

/s/ JAMES HARVEY

JAMES HARVEY
United States District Judge

(1)

Appendix P

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION — FLINT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES MCCLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

v.

NO. 90-CV40148-FL
HON. STEWARD A. NEWBLATT

THE CITY OF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of *HARRY FRANK, Ph.D.*, taken before me, Timothy J. Boroski, RPR-CSR-2378, Notary Public in and for the County of Eaton, acting in the County of Genesee, State of Michigan, at the law offices of Gregory T. Gibbs, Esquire, 2483 S. Linden Road, Flint, Michigan, on Tuesday, September 17, 1991.

APPEARANCES:

GREGORY T. GIBBS, ESQUIRE, (P-26440)
2483 South Linden Road
Flint, Michigan 48532

Appearing on Behalf of Plaintiffs,

Edwin W. Jakeway, P.C.
BY: *MICHAEL J. KELLY, ESQUIRE*, (P-41358)
G-8161 South Saginaw Street
Grand Blanc, Michigan 48439

Appearing on Behalf of Plaintiffs

Appendix P

* * *

(31)

A. Right.

Q. — other than when you have done a comparison of minority to nonminority pass rates?

A. I have not rendered any sort of judgment as to whether or not the instrument is based, that's correct.

Q. You haven't given Mr. Gibbs an expert opinion on that subject yet?

A. No, I haven't.

Q. Did Mr. Gibbs or Mr. Kelly ask you to do any kind of a labor market analysis to assess whether the City of Flint hiring practices, or promotional practices, represented, or contained any kind of racial bias, simply on the numbers of persons that were hired into various positions?

A. At the time that we talked, the context in which the issue that you bring up was addressed was a discussion of what is the relevant pool, labor pool or statistical pool, parent population from which sergeants are drawn.

And I replied at that time that that really depends on what the requirements are for the job. If the requirements are — for example, if there is a residency requirement, if someone — if a particular job requires that someone be a resident of a county, their age requirements, if there are educational requirements, then I replied that the relevant statistical pool that we would have to look at would be all of the individuals

who satisfy to fulfill those requirements.

And then the issue became what are the requirements for the position of sergeant. And at that time there was some uncertainty — they didn't have with them, Greg and Mr. —

MR. KELLY: Kelly.

THE WITNESS: — Mr. Kelly, did not have with them an announcement, promotional examination announcement, so they didn't have the requirements.

The question can be resolved in a second way, and that is, what is the realistic pool? Even if, for example, the sergeant's examination is open nationwide to anybody who has — meets certain educational requirements, certain requirements of physical ability or whatever they happen to be, the question becomes what realistically is the pool from which sergeants are drawn?

If it's opened nationwide but they have never hired anyone who doesn't live in Genesee County, then the nation is not the relevant statistical pool with which we ought to be making comparisons.

As it turns out, the relevant statistical pool is limited — is much more highly circumscribed. It is the cadre of police officers.

Q. (BY MR. NUYEN) If we use that assumption —

A. Okay.

(33)

Q. — that what we have to look at is that the cadre of police officers — you are talking about the current cadre of police officers —

A. Yes.

Q. — if there were artificial barriers that affected the entry level job; in other words, if there are barriers in the — at the workplace at the City that prohibited minority officers from being hired in proportion to the relevant labor market, would that not have an affect on the composition of the cadre that you based your report on?

MR. GIBBS: Before he answers, I want to register an objection on the basis that as far as the Constitution is concerned, that kind of analysis would not be appropriate.

You can go ahead and try to answer it if you can.

Q. (BY MS. NUYEN) Go ahead.

A. If there was a distortion in the sergeant — in the patrol officers's cadre, that could certainly act as a bottleneck.

Q. One of the assumptions that you based your report on is that there was bias-free hiring in the position of patrol officer; isn't that correct?

A. Do you see that somewhere? Where in the —

(34)

Q. I'm asking you.

A. No, I didn't make that assumption.

Q. So you don't care? In your analysis, the analysis that you did in your report, what happened at the level of hiring people into patrol officers is not significant to the analysis that you did?

A. It's nothing I looked at, no.

Q. Okay. That doesn't answer the question, though. I asked you whether or not it was significant to the analysis you did?

A. You mean was it relevant to the analysis I did?

Q. Yes.

A. No. No. The statistical population de facto that we are working with, the parent population, is the population of patrol officers.

The issue, as I understand it, is whether or not the promotion from the pool that sergeants are drawn from is differential — if there is a significant differential between white and black compositions in the parent population and in the subpopulation, namely those that become sergeants.

Q. I want you to assume for the moment that the issue, or one of the issues in this case is whether or not the representation of minorities at the sergeant level today is the same as what it would have been if hiring and

* * *

Appendix Q

Comparison of the Proportions of Black Sergeants and Black Patrol Officers 1980-1989

Harry Frank, Ph.D

INTRODUCTION

These analyses were solicited by Gregg Gibbs, Esq., acting for the plaintiffs (Middleton *vs.* City of Flint). The current hiring and promotion practices of the Flint Police Department are, at least in part, responsive to the labor market analysis conducted by Bendick and Egan Economic Consultants in 1984[1], which emphasizes the disparity between the proportion of black police personnel at various levels and the proportion of blacks in the labor market, as defined by both geography and job qualifications.

Although the requirements for sergeant permit application by persons from outside the ranks of current Flint Police Department personnel, it is understood that the majority of sergeants are the result of internal promotion. Accordingly, it is arguable that the relevant and appropriate statistical population is the cadre of Flint Police Department patrol officers, rather than the formally eligible subpopulation of Flint, Michigan.

The analyses described below were undertaken to determine whether or not blacks are underrepresented in the sergeant cadre *when compared with the relevant parent population, viz., patrol officers.*

---

[1] Bendick, Marc Jr (1984). Minority hiring and promotion in the Flint Police Department: A labor market analysis.

Appendix Q

METHOD

Data Source

Ethnic composition of Flint Police Department is based on Form EEO-4 prepared annually by the Flint Police Department and furnished to plaintiff's attorney by Ms. Donna Nuyen. For purposes of this comparison, the number of sergeants is the sum of males and females recorded in the block labled TECHNICIANS and the number of patrol officers is the sum of males and females recorded in the block labled PROTECTIVE SERVICES in section D of this form. For each cadre (patrol officers and sergeants) the number of blacks in the sum of columns C and H and the number of whites is the sum of columns A and G.

Proportions

Results. The number of persons (N) comprising the patrol officer and sergeant cadre is given below in Table 1 along with the number and observed proportion (P) of blacks in each cadre. The proportions of black patrol officers and sergeants are also presented graphically in Figures 1 and 1a.

Table 1

	Year									
	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
Patrol Officers										
Black	50	39	34	43	42	31	51	46	51	57
Total (N_O)	256	227	220	260	243	202	228	195	228	190
Proportion (P_O)	.195	.172	.155	.165	.173	.153	.224	.236	.224	.300
Sergeants										
Black	10	7	7	7	9	18	20	22	28	27
Total (N_S)	101	83	83	71	69	93	94	92	88	87
Proportion (P_S)	.099	.084	.084	.099	.130	.194	.213	.239	.318	.310

Appendix Q

The question of central concern is whether or not the proportion of black sergeants falls short of the proportion of black patrol officers. For each of the years in which data were furnished, I therefore tested the hypothesis that the proportions are equal against the alternative hypothesis that the proportion of black patrol officers is greater than the proportion of black sergeants.

It can be seen from Table 2 that $NP > 5$ and $N(1 - P) > 5$ for both cadres in every year, so the data satisfy the assumptions required to use the normal approximation. The test statistic

$$Z_{\text{diff}} = \frac{P_O - P_S}{\sqrt{\frac{P_O\,(1 - P_O)}{N_O} + \frac{P_S\,(1 - P_S)}{N_S}}}$$

was calculated for each year. These value are reported in Table 2 and presented graphically in Figure 2.

Table 2

Year	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989
Z_{diff}	2.48	2.22	1.80	1.58	0.90	−0.83	−0.22	−0.06	−1.69	−.173

Discussion. The proportion of black patrol officers was significantly greater ($p < .05$) than the proportion of black sergeants only in years 1980 to 1982. When $z = 0$, the two proportions are equal, and negative values (e.g., for years 1985 through 1989) indicate that the proportion of black sergeants is *greater* than the proportion of black patrol officers. It is not permissible to change the direction of one's alternative hypothesis *after* looking at data, so the possibility that the proportion of black sergeants is significantly greater than the proportion of black

patrol officers was not examined for any year. The results do, however, permit the following conclusions:

1. In comparison to the population of Flint Police Department patrol officers, blacks were significantly underrepresented in the sergeant cadre from 1980 through 1982.

2. The proportion of black patrol officers remained greater than the proportion of black sergeants through 1984, but the difference was *not* statistically significant and should be interpreted as sampling error.

3. Since 1985, the data are most consistent with the hypothesis that the proportion of black sergeants is equal to or greater than the proportion of black patrol officers.

Trends

The proportions of black patrol officers and sergeants were submitted to trend analyses in order to capture and compare consistent patterns of change over the 10-year period. A number of trend models were examined (linear, quadratic, cubic, S, etc.). The models that exhibited the most significant results were linear:

$$\hat{P} = b_0 + b_1 t$$

and quadratic:

$$\hat{P} = b_0 + b_1 t + b_2 t^2$$

where $\hat{P}$ is the estimated or predicted proportion of black patrol officers or sergeants and t is time.

Results. The linear trends for both cadres are plotted in Figure 3. Significance probability (p) and the square of the multiple correlation (R^2) are reported for both models in Table 3. The square of the multiple correlation (the coefficient of determination) can be interpreted as the proportion of variability (in black representation) that can be attributed to time.

Appendix Q

Table 3

	Linear		Quadratic	
	p	R^2	*p*	R^2
Patrol Officers	< .015	.55	< .001	.86
Sergeants.....	< .0001	.90	< .001	.95

Discussion. The trend analyses suggest that the proportion of blacks in the sergeant cadre steadily converged with the proportion of blacks in the patrol officer cadre from 1980 to about 1985 and then diverged, with the proportion of black sergeants *exceeding* the proportion of black patrol officers. (I say "about" because the exact point of convergence depends upon whether one speaks of the observed proportions, or the linear trend line, or any of the trend curves that can be fitted to the data.)

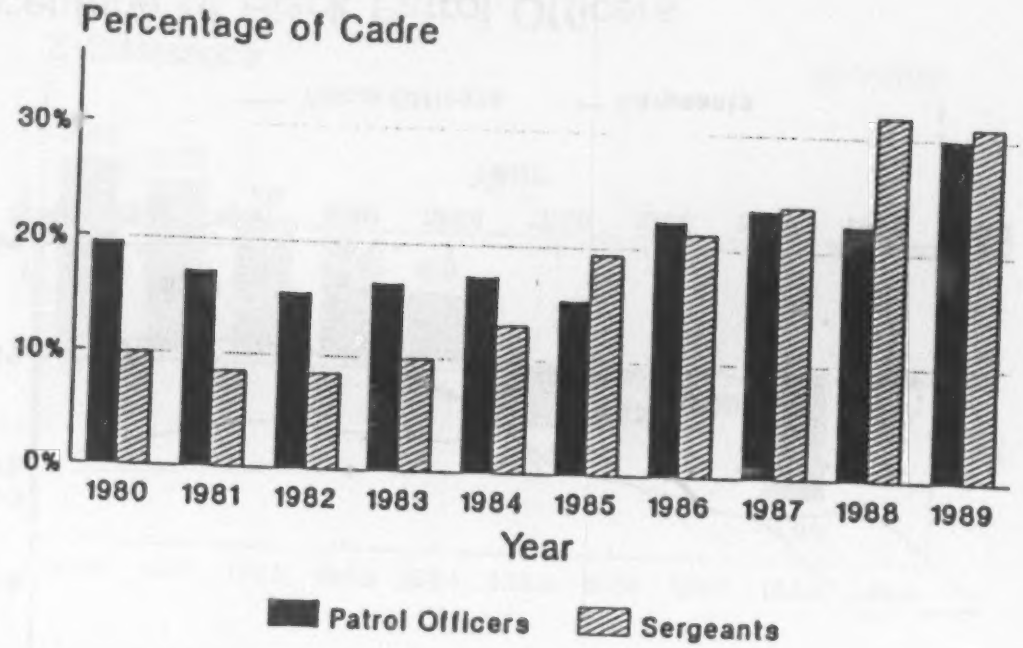
It should be noted that this convergence began before the present system of 1-to-1 promotion was implemented. Furthermore any disproportionality that might reflect artificial barriers to the promotion of black patrol officers was clearly eliminated by no later than 1985.

In addition, the linear trend functions indicate that the proportion of black sergeants is increasing faster than the proportion of black patrol officers. Based on linear trends, one can therefore predict that under the current systems of entry-level hiring and promotion, the difference between the proportion of black sergeants and black patrol officers will increase and that this increase will favor sergeants.

It must be emphasized that this projection assumes a *linear* trend. The curvilinear (quadratic) component of the trend accounts for a smaller proportion of variance than does the linear component in both cadres, but it is statistically significant for

both. Furthermore, the curvilinear component is more pronounced in the patrol officer cadre. The prediction that the proportion of black sergeants will continue to increase faster than the proportion of black patrol officers should therefore be entertained with caution.

Figure 1a



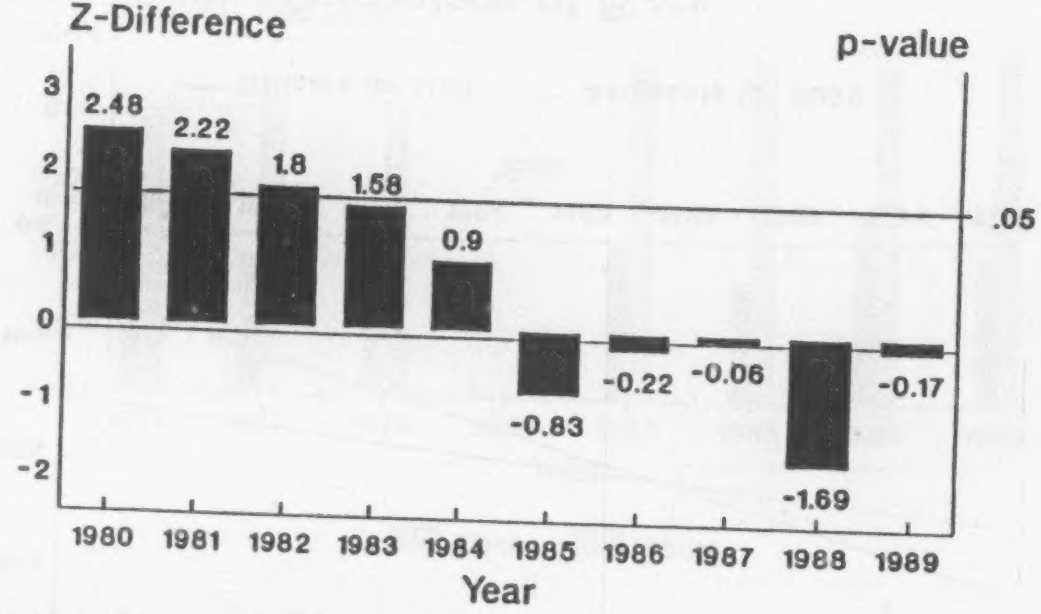
Percentage of Black Patrol Officers and Sergeants

Appendix Q

Figure 1

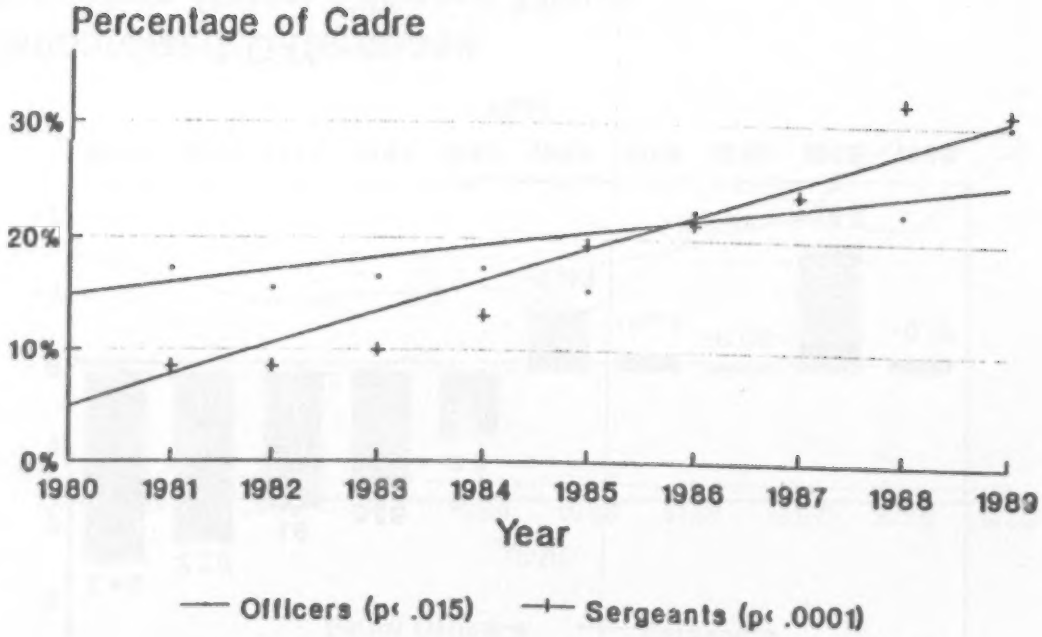
Percentage of Black Patrol Officers and Sergeants

Figure 2



Standardized Differences:
Proportion Patrol Officers Minus
Proportion Sergeants

Figure 3



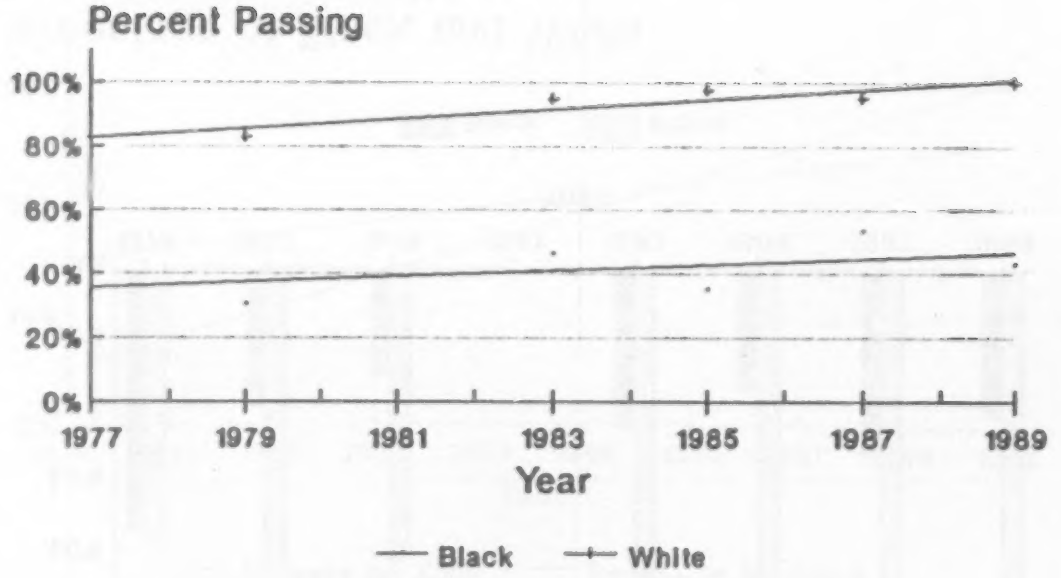
Linear Trends: Percentage of Black Patrol Officers and Sergeants

Appendix Q

Figure 4

Percentage of Black and White Candidates Passing Written Sergeant Examination

Figure 5



Linear Trends: Percentage of Candidates Passing Written Examination (1977-1989)

Appendix R

Flint Police Officers Association
210 East Fifth Street
Flint, Michigan 48502

ALAN DICKENSON
President

MARK CAMPBELL
Vice-President

WILLIAM HAMILTON
Secretary

DENNIS MICHAEL
Treasurer—

January 20, 1984

re: Contract Ratification Vote

Dear Members:

The bargaining team has just reached a tentative agreement with the City on "affirmative action" in the context of a contract extension with substantial economic improvements, including wage increases retroactive to July 1, 1983. The Executive Board has voted to submit the proposed contract to the membership for a ratification vote.

The essence of the proposed agreement is a one-to-one promotional ratio for sergeant (i.e. one minority for every non-minority promoted) for a period of five(5) years, along with a two year wage package that would increase the wages of a five year police officer by approximately $4,000.00, including a check for retroactive benefits in the gross amount of approximately $1,300.00.

The Association will hold three separate informational meetings on the proposed agreement in the Health Auditorium, City Hall on Tuesday, January 24, 1984. Meetings will be held at

Appendix R

7:30 a.m., 1:00 p.m. and 4:30 p.m. You are urged to attend at least one of these meetings to be fully informed on the proposed agreement.

If this proposed agreement is not ratified by the membership or by City Council, the resulting dispute will be resolved by final and binding arbitration under provisions of Act 312.

The ratification vote will be conducted by secret ballot under the supervision of the Association Election Committee on Friday, January 27, 1984. The polls will be open in the classroom from 7:00 a.m. until 5:00 p.m.

For the Executive Board,

Alan Dickenson, President

Appendix R

SUMMARY OF PROPOSED AGREEMENT

1. The current contract, which expires on June 30, 1984, will be extended through June 30, 1985.

2. The current contract article on promotions (Article 38) will be amended for a period of five (5) years. The amendments will give the City the right to maintain two separate promotional lists, one consisting of eligible minorities and one of eligible non-minorities — both lists to be made up of those police officers who have successfully passed the promotional examination for sergeant. Under the separate lists the City may promote on the basis of a ratio not to exceed one eligible minority for every eligible non-minority promoted. The separate lists shall terminate five years from the date of ratification, to and including January 31, 1989, at which time the one-to-one ratio shall cease.

3. During the same five year period, the City must maintain a minimum of eighty-two (82) sergeants positions, subject to certain exceptions, such as a continuation of the existing millage for the foot patrol program. Any reductions in the foot patrol millage would result in a proportionate reduction of the minimum eighty-two sergeants positions.

4. The current promotional list will expire as scheduled on March 23, 1985; but future promotional lists will only last for a period of eighteen (18) months. In order to facilitate promotions from the current list, the City will be required to reach the minimum eighty-two sergeants positions before March 23, 1985.

5. Effective retroactive to July 1, 1983, for all hours previously paid, the present compensation schedule shall be increased by four percent (4%) plus $400.00. For example, a five year officer (current base $25,264) would have a base wage of $26,674 retroactive to July 1, 1983.

Appendix R

6. Effective July 1, 1984, the compensation schedule will be increased by five percent (5%) plus $400.00. With this increase, a five year officer would have a base wage of $28,470 effective July 1, 1984.

7. Gun Proficiency Allowance. Effective during the first full non-pay week in December of each year, and retroactive to December of 1983, each employee who meets the present mandatory weapons proficiency levels established by the Department, and is in the City's employ on the date of payment, will be paid a yearly proficiency allowance of $400.00. This allowance will be paid in a lump sum as a separate check and shall not be considered compensation under the Retirement Ordinance.

8. The retroactive pay benefits set forth above, including the December payment of $400.00 for the Gun Proficiency Allowance, shall be paid promptly by the City as soon as possible following ratification of the proposed agreement.

(1)

Appendix S

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES MCLELLAN; MARK CAMPBELL; AND THOMAS HILGENDORF,

Plaintiffs,

Case No. 90-CV-40148-FL
Hon. Stewart Newblatt

v

CITY OF FLINT; a Municipal Corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

_____ /

The deposition of *MAYNARD NEWMAN* taken before me, Reatha M. Cochran, CSR-2427, Certified Shorthand Reporter and Registered Professional Reporter and Notary Public, at Flint City Hall, 1101 South Saginaw, Flint, Michigan, on Friday April 12, 1991, commencing at or about 10:00 A.M.

APPEARANCES:

EDWIN W. JAKEWAY, P.C.
BY: *MICHAEL J. KELLY, ESQ. (P41358)*
G-8161 S. Saginaw Street
Grand Blanc, Michigan 48439

On behalf of Plaintiffs.

KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C.
BY: *DONNA R. NUYEN, ESQ. (P34636)*
440 East Congress, Fifth Floor
Detroit, Michigan 48226

On behalf of Defendant City of Flint.

the position of police sergeant.

Q. What is your rank on that list?

A. Fourteenth.

Q. Did you study any differently for this exam in 1987 than you did for the one in '85?

A. Yes. I put in more time studying. I obtained a copy of — I can't remember the author's name, but it's a study guide for the Iaonne book on supervision. In the previous exams there were questions that came or were related to information in that book and I sent away and purchased the study guide, I believe. I did obtain one — I either purchased or borrowed one. I've since purchase one that I also reviewed.

Again — oh, I also studied the department procedure manual which is issued to ali officers, memos, training bulletins that were available, again the State Police Handbook, as I call it — I don't know if it's the correct title — reference laws and elements of those laws.

Q. Do you think this exam is a difficult exam?

A. No.

Q. If there had not been an affirmative action plan in place in 1987, would you have been promoted off the '87 list?

A. I believe so. My understanding was that there was 18 promotions. I'm not positive on that, but 17, 18,

something like that promotions made off of this list and being 14th, I believe this is the exam where the city for whatever the good of the city added 10 points to everyone's score which in essence ended up in the promotion of two people who initially failed the exam.

Q. And who would those two people be?

A. Sergeant Kenneth Booker and Sergeant Lois Thomas.

Q. And both of those people are on the minority eligibility list?

A. Correct.

Q. Do you know what the original passing rate was?

A. I was always under the impression that 70 percent was passing; but in the past, I had seen one individual promoted with 69 — something in excess of 69.5 or higher, and it was apparently rounded off to a 70 for whatever reason.

Q. At the time you took the exam in 1987 what was your understanding of what a — before the city added these 10 points, what was your understanding of what a passing score was?

A. Seventy. Seventy percent.

Q. And everyone who took the test had 10 points added to their score?

A. That's my understanding.

Q. Do you know if a grievance was ever filed challenging

* * *

Appendix T

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES MCLELLAN AND THOMAS HILGENDORF,
Plaintiffs,

Hon. Stewart A, Newblatt
Case No. 90-CV-40148-FL

v

CITY OF FLINT, a Municipal Corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,
Defendants.

_____ /

BRIEF IN SUPPORT OF
DEFENDANT CITY OF FLINT'S
MOTION FOR SUMMARY JUDGMENT

Appendix T

TABLE OF CONTENTS

STATEMENT OF ISSUES INVOLVED 239a

INDEX OF CONTROLLING AUTHORITY 240a

STATEMENT OF FACTS 242a

ARGUMENT 254a

THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT SINCE THE CITY'S AFFIRMATIVE ACTION PLAN DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION 254a

A. The City Has A Compelling Governmental Interest In Eradicating The Past Effects Of Its Discriminatory Hiring And Promotion Policies 260a

B. The City's Affirmative Action Plan Is Narrowly Tailored To Serve The City's Compelling Governmental Interest .. 262a

1. It was necessary for the City to provide the relief to minorities and there were no other reasonable alternative methods available 263a

2. The City's affirmative action plan is flexible and limited in its duration 264a

3. The numerical goals of the City's affirmative action plan are in relation to the relevant labor market 265a

4. The City's affirmative action plan is not overly intrusive on the rights of third parties 267a

CONCLUSION 268a

STATEMENT OF ISSUES INVOLVED

WHETHER THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT SINCE THE CITY'S AFFIRMATIVE ACTION PLAN DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION?

Appendix T

INDEX OF CONTROLLING AUTHORITY

U.S. SUPREME COURT

City of Richmond v J.A. Croson Company, 488 US 469, 109 SCt 706, 102 L Ed2d 854 (1989) ... 21, 22

University of California Regents v Bakke, 438 US 265, 98 SCt 2733, 57 L Ed2d 750 (1978) 22

United States v Paradise, 480 US 149, 107 SCt 1053, 94 L Ed 2d 203 (1987) 16, 17, 18, 19, 24, 25, 26, 28, 29, 30

Wygant v Jackson Board of Education, 476 US 267, 106 SCt 1842, 90 L Ed2d 260 (1986) 16, 22

CIRCUIT COURT OF APPEALS

Bratton v City of Detroit, 704 F2d 878 (6th Cir 1983) *modified,* 712 F2d 222 (6th Cir 1983) *cert den* 29

Busby v City of Orlando, 931 F2d 264 (11th Cir 1991).. 15

Detroit Police Officers Ass'n v Young, 608 F2d 671 (6th Cir 1979) 15

Long v City of Saginaw, 911 F2d 1192 (6th Cir 1990) 16

Valentine v Smith, 654 F2d 503 (8th Cir 1981) 15

Vogel v City of Cincinnati, 959 F2d 594, (6th Cir 1992) 16, 19, 20, 26, 30

DISTRICT COURT OPINIONS

Alfaro v Suber, No. 613 (E.D. Mich 1977) 9, 11, 12, 13, 23

Baker v City of Detroit, 483 F Supp 930 (ED Mich 1979) 29

Barcume, et al v City of Flint, et al, 84-8066, (E.D. Mich April 5, 1990) 20, 21, 23, 26, 27, 29, 30

Detroit Police Officers Association v Young, 765 F Supp 393 (ED Mich 1991) 21, 29

Flint Police Patrolmen's Association v City of Flint, Genesee County Circuit Court No. 74-33234-CL 11

Appendix T

Fountain v City of Waycross, Georgia,
701 F Supp 1570 (SD Ga 1988) 22
Holliman v Price, 9 FEP Cases 1363,
(ED Mich 1973) 9, 10, 12
23
Waldron v Flint Police Patrolmen's Association,
No. 74-40084 (E.D. Mich 1980) 11
CONSTITUTIONS AND STATUTES
U.S. CONST., AMEND. 14 15

Appendix T

STATEMENT OF FACTS

A. Procedural History

On May 16, 1990, Plaintiffs filed a three count Complaint alleging that the City of Flint Police Department's (hereinafter the "City") promotional practices for promotion of patrol officers to the rank of Sergeant, which are embodied in a collective bargaining agreement, violate 42 USC §1981, 42 USC §1983, and their rights under the Michigan Elliott-Larsen Civil Rights Act, MCL §37.2101, *et seq.*; MSA §3.548(101), *et seq.*

At the hearing on the City's Motion to Dismiss and for Summary Judgment filed on October 9, 1991, the Court intimated to the parties that Plaintiffs' Elliott-Larsen claim would be dismissed, while the federal counts would remain. The Court also ordered that Plaintiffs' attorneys become familiarized with the facts and procedural history of the *Barcume, et al v City of Flint, et al,* Docket No. 84-8066, which is currently pending before this Court. The issue raised by Plaintiffs' Complaint is whether the affirmative action plan for the promotion of patrol officers to the rank of Sergeant, which was implemented by the City in 1984, violates their rights under the Fourteenth Amendment to the United States Constitution.

B. The Need For Affirmative Action In the City's Police Department

Beginning in early April, 1983, the Flint City Council conducted a series of special meetings to investigate the status of affirmative action in the City of Flint. The transcripts of the city Council meetings are part of the case file in *Barcume, et al v City of Flint, et al,* 84-8066. One of the issues into which the City Council inquired was whether the testing procedures for the Sergeant's promotional exam had an adverse impact on minorities

Appendix T

(Barcume v City of Flint, 84 CV 8066, April 10, 1986, Memorandum Opinion and Order, at pp. 4-5).

As a result of these hearings the City Council ordered the City to form a task force, together with the FPOA and Police Department officials to address the issue of affirmative action. The FPOA and the City entered into an affirmative action letter establishing such a task force (Exhibit 2). On October 25, 1983, after several meetings, the Affirmative Action Task Force issued its recommendations (Exhibit 3). The City and the FPOA then entered into negotiations on the subject of affirmative action. A tentative agreement was reached by the City and the FPOA.

On January 20, 1984, the FPOA informed its membership of the tentative agreement (Exhibit 4). On January 27, 1984, the proposed agreement was ratified by the FPOA membership by a vote of 125-82. The ratified Addendum (Exhibit 1) to the 1983-1984 collective bargaining agreement included the following terms:

1) The division (as a practical matter) of the 1983 police officer promotion list into a minority list and a non-minority list;

2) Promotions would occur on a 1:1 basis from the minority and non-minority lists;

3) The number of police Sergeants would increase from the January, 1984 level of 74 to 82 by March 23, 1985;

4) The 1983 promotion lists would expire on March 23, 1985. Subsequent promotion lists would only last for 18 months instead of 24 months;

5) All police officers would receive a substantial increase in pay;

6) The current collective bargaining agreement would be extended to June, 1985;

7) The Plan would expire in 5 years, unless it was extended by the City and the FPOA; and

8) Implementation of the Plan was contingent on the City finding that there was a need for affirmative action in the Police Department.

On January 30, 1984, after significant and lengthy debate, the Addendum was initially narrowly rejected by the City Council. After further discussion, the City Council overwhelmingly ratified this Addendum on February 1, 1984.

Pursuant to the Addendum and prior to implementing any affirmative action efforts, Mayor James Sharp, Jr. on March 22, 1984, asked the Flint Human Relations Commission (the "HRC") to hold public hearings on the need for affirmative action within the Flint Police Department.[1] The Civil Rights Committee of the HRC held such hearings on April 4, 10 and 11, 1984. Copies of the transcripts of these hearings are also contained in the *Barcume* case. A multitude of representatives for African-Americans, Hispanics, special interest groups and experts testified and presented statistical evidence to the HRC regarding the absolute need for further affirmative action within the Police Department and the various methods of best achieving the City's goal of remedying the under-representation of minorities in the Police Department. The testimony and reports of the various witnesses were transcribed, compiled and carefully studied by the

[1] The Flint City Code authorizes the HRC to hold such hearings and make these findings and recommendations. The Flint City Charter specifies that members of the HRC are sworn to uphold the Constitutions of the United States and State of Michigan, and that they must discharge their duties on behalf of all of the citizens of the City of Flint.

HRC through the Summer of 1984. After examining this voluminous evidence, the HRC found:

1) That there existed and exists unlawful discrimination against minorities in hiring, promotion and assignment practices in the FPD.

2) That minorities currently would be represented in substantially larger numbers but for prior discrimination.

3) That in *Holliman supra*, and *Alfaro, supra*, this Court found that the City had engaged in unlawful racial discrimination in hiring and promotion in the FPD and that the remedial orders of this Court had not been fully complied with.

4) That according to the 1980 census, minorities constituted 46.3% of Flint's total population and that the appropriate labor market for the position of Police Officers in Flint is approximately 45% minority.

5) That evidence reveals that virtually all promotional examinations have had an adverse impact on minorities.

Barcume, Memorandum Opinion and Order, April 10, 1986, p. 6.

Hence, in August, 1984, the HRC issued and adopted its final report recommending the implementation of the 1:1 promotion plan negotiated between the City and the FPOA. The 1:1 promotions would be utilized, on an as needed basis, until the sergeant rank accurately reflected what the minority composition of that rank would have been in the absence of prior discrimination. The HRC concluded that in "order to avoid further delay in redressing imbalances in the workforce, that the proposed 1-to-1

promotion of minorities to whites be implemented immediately ..." (Exhibit 5, p. 16).

The findings of the HRC were supported by both uncontroverted statistical evidence of a conspicuous under-representation of minorities in the Department and by federal judicial findings of past discrimination in hiring and promotions by the City (see, generally, "Need for Affirmative Action in the City of Flint's Police and Fire Departments: A Report on Public Hearings held on April 4, 10 and 11, 1984", attached as Exhibit 5.

1. Statistical Evidence Established A Conspicuous Under-Representation of Minorities Within The City's Police Department.

During the April, 1984 hearings, the HRC was provided with a labor force analysis of the Police Department (Exhibit 6). This report, prepared by an expert labor market economist, provided an extensive analysis of the minority composition within the ranks of police officer and sergeant ("Minority Hiring and Promotion in the Flint Police Department: A Labor Market Analysis", attached as Exhibit 6). The analysis utilized official statistics from the U.S. Bureau of Census and from Department and City personnel departments (*Id.*, at p. 1). The analysis concluded with several pertinent findings. First, based upon 1980 census figures, departmental hiring criteria,[2] labor force status (those interested in being employed), City hiring patterns and census undercount, forty-five (45%) percent of the labor pool for the entry level patrol officer position was minority[3] (Exhibit 6, pp. 3, 4). Based on this foundation, the report concluded that the minority

[2] The Department's hiring criteria consisted of being within the ages of 18-34 and holding a high school diploma.

[3] According to the 1980 census, ninety-three (93) percent of all Flint minorities were African Americans (Exhibit 6, p. 4).

shortfall in 1984 among the police officer rank was 20.4% below what the estimated minority representation in the officer rank would have been in the absence of past discrimination.[4]

Likewise, the report concluded that within the rank of sergeant there was a 1984 minority shortfall of 20.3%, based on the fact that in 1984 minorities comprised only 10.8% of the sergeant rank, in comparison to an estimated minority percentage of 31.1% had no prior discrimination occurred in the City's hiring and promotion practices (*Id.*) With respect to the City's proposal to implement a 1:1 minority promotional ratio to eradicate this under-representation, the statistical report concluded that such a plan "substantially increases the rate of elimination of minority under-representation in the supervisory ranks of the Flint Police Department" (Exhibit 6, p. 11).

Uncontradicted testimony during the hearings also established that a conspicuous under-representation of minorities[5] existed through all ranks in the Department. The HRC was presented with testimony from, among others, Flint City Council President Melvin McCree. President McCree testified that the City Council had conducted investigations in 1981 and 1983 which resulted in a finding that there was "a dramatic under-representation of minority persons in all ranks of the police

[4] This figure results from the fact that minorities would compromise 39.6% of the officers in the absence of past City discrimination, whereas the actual 1984 percentage of minorities in the officer rank constituted only 19.1% (Exhibit 6. p. 7).

[5] Testimony was presented to the HRC not only about the under-representation of African-Americans, testimony was also presented regarding the plight of Hispanics in the Flint Police Department. Three witnesses, David Solis, Interim Chairperson of the Coalition of Concerned Hispanics, Maria Andriguez, Commission on Spanish Speaking Affairs and Henry Acevedo, Labor Council for Latin American Advancement all presented testimony about the underutilization of Hispanics in the Police Department.

department..." (Exhibit 5, p. 3). In light of the expert labor market analysis and the voluminous testimony brought forth during the hearings, the HRC concluded:

> Minority persons have never been represented in the police department's workforce in proportion to their availability in the labor market. The city has never achieved parity at any rank in the police department's sworn personnel (Exhibit 12, p. 4).

The evidence presented to the HRC conclusively established that this dramatic under-representation was a direct result of the discriminatory hiring and promotional practices of the City (*Id.*, at p. 12). Since 1984, although a portion of this under-representation has been redressed, minorities still are not proportionally represented at the Sergeants rank as if no discrimination had occurred (Exhibit 7).

2. Historical Evidence of Prior Discrimination In Hiring And Promotions Within The City Police Department.

Since the beginning of the 1970's, the hiring and promotional practices of the City have been subject to judicial scrutiny. This scrutiny has resulted in findings that these practices were discriminatory and were the reason for the severe minority under-representation within all ranks of the Department. This historical discrimination by the City was presented in detail to the HRC.

In 1960, the population of the City of Flint was approximately 190,000 persons. The percentage of minority citizens at that time was approximately seventeen (17%) percent (Exhibit 13, p. 5). The percentage of minority citizens living in

the City of Flint increased in 1970 to twenty-eight (28%) percent and to thirty-four (34%) percent in 1974.[6]

Despite the significant number of minority persons living in the City, the City's workforce remained almost entirely white. In 1971, out of a total of 367 uniformed police officers, only ten (10) were black. The under-representation of minorities in the Police Department, as well as other areas of City government, led the U.S. Department of Health, Education and Welfare (HEW) in 1971 to condition the receipt of federal funds upon major revisions in the City's hiring practices. In response, the City Council adopted an affirmative action program designed to induce more minorities to apply for and accept employment with the City. See, *Holliman v Price*, 9 FEP Cases 1363, 1364-1365 (ED Mich 1973).

On May 19, 1972, a group of unemployed minority residents of the City filed a lawsuit alleging that the employment practices of the Police Department were discriminatory. A Temporary Restraining Order was issued by this Court, enjoining the use of federal funds secured under the Emergency Employment Act. *Holliman, supra*, 9 FEP Cases at 1366. In addition, on August 7, 1972, William Whitbeck, the Area Director of the U.S. Department of Housing and Urban Development (HUD) sent a letter to Frank Patitucci, Executive Director of Community Development for the City of Flint, expressly stating that the City must fulfill the goals of its 1971 Affirmative Action Plan[7] if it wanted to receive

---

[6] These statistics are findings by Judge Harvey in his Opinion dated 05/18/77 in *Alfaro v Suber*, Civil Action No. 613 (attached as Exhibit 8). The City asks this Court to take judicial notice of this Court's records in the *Alfaro* case and other cases cited herein. See Federal Rule of Evidence 201.

[7] The HRC made specific findings that the City's 1971 AAP goal of attaining parity between minority and non-minority groups has never been met (Exhibit 5, p. 4). The commission also concluded that because of top level

approximately $6,500,000 in neighborhood Development and Rehabilitation Program Grants for fiscal year 1972-1973.[8] Specifically, Mr. Whitbeck demanded that:

1) The City fulfill its declaration of intent to hire 30% minorities for vacancies at each entry level of employment to achieve racial parity with the appropriate workforce;

2) In administrative and supervisory levels, 50% of all vacancies must be filled by minorities;

3) Professional intern positions must be filled by residents of federal housing projects and minorities.

On January 3, 1973, this Court entered a Preliminary Injunction, suspending the City's employment criteria for twenty patrolmen hired with funds provided under the Emergency Employment Act. *Holliman, supra,* 9 FEP Cases at 1372. The Court held that the City failed to afford the plaintiffs and other black unemployed applicants the preferences in hiring required by federal law. *Id.* at 1369. The Court also recognized that the City had historically discriminated against minorities, and that the effects of this discrimination were prevalent in the Police Department.

From 1971 to 1975, significant percentages of the new police recruits were minorities. However, it took another lawsuit (*Alfaro, supra*), filed on January 23, 1973, before the first minority police officer was promoted to any position above the initial entry level. As a result of *Alfaro, supra*, the City imple-

---

neglect of the 1971 AAP, the Plan "languished" from 1975 to 1981 (*Id.* at p. 11). Clearly, the 1971 Plan was not remedying the effects of the City's prior discrimination.

[8] This letter was attached as an exhibit to the Complaint in *Alfaro, supra.*

mented a preferential minority promotion plan in the Police Department. This plan was immediately challenged by the Flint Police Patrolmen's Association. *Flint Police Patrolmen's Association v City of Flint*, Genesee County Circuit Court No. 74-33234-CL. The City and the Union subsequently entered into a negotiated agreement to allow preferential promotion of minorities in settlement of this lawsuit (the Stipulation of Settlement and Order of Dismissal of this lawsuit is attached as Exhibit 9). This agreement, which ran for five years, resulted in the promotion of eight minorities to Police Sergeant from Police Officer.[9]

In *Alfaro, supra*, Judge Harvey found that the diminished ability of minorities to apply for and receive appointments to entry level positions and then to reach higher levels in the Police Department was due to employment requirements and practices which were discriminatory (*Alfaro* at 15, 17, 18). As part of the 1971 AAP, the City agreed to undertake test validations and analysis of job skills relevant to entry level positions in the Police Department. See, *Holliman, supra*, 9 FEP Cases at 1365. This study, undertaken by Harry Frank, Plaintiffs' expert in this case, showed that the entry level exam was not valid, and that it had a disparate impact upon minority applicants. This invalid exam thus artificially restricted the number of minority police officers hired by the City.

---

[9] This affirmative action plan also was challeged by several white male officers in *Waldron v Flint Police Patrolmen's Association*, Civil Action No. 75-40084. Magistrate Harvey Walker, appointed as a Special Master in that case, issued a Memorandum Opinion and Recommendation on March 4, 1980, holding that the City's affirmative action plan did not violate the Equal Protection and Due Process Clauses of the U.S. Constitution. The Hon. Stewart Newblatt denied all objections to this Opinion on September 25, 1981. Hence, the reverse discrimination lawsuit was dismissed on September 29, 1981 (a copy of the decision is attached as "Exhibit 10").

Appendix T

The City also employed criteria for the Police Officer position which had a disparate impact on minorities (Exhibit 5, p. 2). Prior to 1973, the City required applicants to have two years of college education. *Holliman, supra*, at 1370-1371. In addition, the city used arrests (without convictions) as a disqualifying factor. The education requirement was not job related, and the restrictions on persons who had been arrested had a disparate impact on minorities. (*Alfaro*, at p. 8, 9, 15).

Even when minorities were hired, they faced significant barriers to promotion. Prior to 1974, the City allowed unlimited seniority credit on promotion exams. Police Officers could add one point to their promotion test scores for each year on the police force. Minorities, who were only recently hired, were pushed far back on the promotion list when seniority points were added to the scores of white officers. The City and the Union agreed to limit seniority credits to 15 points in 1974. The *Alfaro* court found, however, that only five years of seniority credit could be justified and enjoined the City from using additional years of service to boost promotion exam scores.

Finally, the *Alfaro* court enjoined the City from using its promotion exam for the Police Lieutenant position. (*Alfaro*, p. 20).[10] This exam was weighted heavily toward investigative experience. No black Police Sergeant had more than six months of experience in criminal investigation and, therefore, no black Sergeant passed the exam. Few of the Police Lieutenants, however, worked directly with or used criminal investigations. Hence, the promotion exam was not job related and it discriminated against blacks.

---

[10] The court retained jurisdiction over the Police Department's employment practices until May 17, 1983.

Appendix T

In addition to these judicial findings of prior discrimination, the HRC also concluded that racial discrimination against minority citizens was taking place within the Department (Exhibit 5, p. 3). This discrimination included incidents of police brutality against, and alleged unwarranted killings of blacks (*Id.*). The substantial disparity between the percentage of minorities in the Department and of the Flint citizenry also raised serious concerns about continued discrimination and cooperation between the Department and the minority community (*Id.*).

In light of this uncontroverted evidence, the HRC concluded that the Plan was necessary to remedy the effects of the City's past and current discrimination against minorities (Exhibit 5, p. 5). The conclusions of the HRC are enlightening:

> Clearly, convincing evidence was presented to the Human Relations Commission through written and oral testimony and relevant documentation showing, and the Commission has concluded that *the Flint Fire and Police Departments have historical and current records of unlawful discriminatory and exlusionary policies, practices and criteria that have adversely impacted and continue to adversely impact minorities and females in hiring and promotion.*
>
> *Such unlawful policies, practices, and criteria have resulted in an underrepresentation of minority and female persons in all ranks of the police* and fire *department's sworn personnel.*
>
> The achievement of an end-goal to eliminate these race/sex imbalances within a reasonable frame of time at all rank levels requires the expeditious adoption and implementation by the City of Flint of a comprehensive

affirmative action plan with specific goals and time tables.

The Human Relations Commission is aware that some initiatives have been taken by the Personnel Department including improvement in validation of exams; modifications of certification procedure; dissemination of information regarding employment opportunities to protected classes; pre-employment inquiries in compliance with state and federal laws; and in-service training and retraining programs for all personnel. These initiatives should be refined and strengthened. *However, it is clear from the record that these initiatives have not sufficed to eliminate race/sex imbalances in the work force.* (Exhibit 5, pp. 12, 13) (emphasis added).

Since 1984, there have been a number of minorities promoted to the rank of Sergeant. The imbalance has not been eliminated completely, however. Minorities currently constitute 35.9 percent of Sergeants in the City's Police Department. Based upon the current labor market analysis by Dr. Bendick, (Exhibit 7) the City is approximately three (3) minority promotions away from meeting its goal.

ARGUMENT

THIS COURT SHOULD DISMISS PLAINTIFFS' COMPLAINT SINCE THE CITY'S AFFIRMATIVE ACTION PLAN DOES NOT VIOLATE THE FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION.

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to any person within its

jurisdiction the equal protection of the laws." U.S. CONST., AMEND. 14.[11] The United States Supreme Court has held in no uncertain terms that an affirmative action plan voluntarily implemented by a municipality conforms with the Fourteenth Amendment if it is "... justified by a compelling governmental interest [and] ... the means chosen by the state [are] 'narrowly tailored to achievement of that goal' ". *Wygant v Jackson Board of Education*, 476 US 267, 274, 106 SCt 1842, 1847, 90 L Ed2d 260 (1986); *Long v City of Saginaw*, 911 F2d 1192, 1195 (6th Cir 1990); *Vogel v City of Cincinnati*, 959 F2d 594, (6th Cir 1992). The Supreme Court, has upheld, over a Fourteenth Amendment challenge, a voluntarily affirmative action plan such as the one involved in this case.

In *United States v Paradise*, 480 US 149, 107 SCt 1053, 94 L Ed 2d 203 (1987), as in this case, a federal district court had determined that the hiring and promotion policies of the defendant's public safety department had an adverse impact on blacks, and had created an under-representation of blacks at all levels of the police department. In order to remedy this historical discrimination, the district court originally entered an order requiring a 1:1 hiring ratio for the entry level position.

Thereafter, however, the district court determined a 1:1 ratio also was required for promotions to the rank of corporal since the defendant had been slow to remedy the historical discrimination which permeated all ranks and which caused these higher ranks to be almost devoid of blacks. The Supreme Court upheld the

[11] Plaintiffs have brought their constitutional claim under both 42 USC §1981 and §1983. However, the law is clear that because relief under §1981 can be no greater than under §1983, a Section 1981 claim merges with a Section 1983 claim. *Busby v City of Orlando*, 931 F2d 264, 771-772 (11th Cir 1991); *Valentine v Smith*, 654 F2d 503, 512 (8th Cir 1981); *Detroit Police Officers Association v Young*, 608 F2d 671, 692 (6th Cir 1979).

1:1 ratio for promotions since the defendant had established a compelling governmental interest (its own prior discrimination) and the ratio was narrowly tailored to serve that interest.

Initially, the Court determined that there was "unquestionably" a compelling interest in remedying the past and present discrimination by the state. *Paradise, supra*, 480 US at 167, 107 SCt at 1064. The Court held that the evidence establishing pervasive, systematic and obstinate discrimination by the state had created a profound need and a firm justification for the race-conscious relief with respect to promotions and hiring. *Id.* The Court noted that the entry level discrimination resulted in minority under-representation throughout the lower and upper level ranks of the state police department. In doing so, it emphatically rejected the argument that no remedial relief for promotions was necessary:

> The Department and the intervenors, however, maintain that the Department was found guilty only of discrimination in hiring, and not in its promotional practices. *They argue that no remedial relief is justified* in the promotion context *because the intentional discrimination in hiring was without effect in the upper ranks, and because the Department's promotional procedure was not discriminatory. There is no merit in either premise.*
>
> *Discrimination at the entry level necessarily precluded blacks from competing for promotions*, and resulted in a departmental hierarchy dominated exclusively by non-minorities. The lower courts determined that the situation was explicable only by reference to the department's past discriminatory conduct. *Id.*, 480 US at 168, 107 SCt at 1065 (emphasis added).

Next, the Court held that the 1:1 hiring and promotion ratio for minorities was narrowly tailored to serve a compelling state interest. The Court relied upon several factors in making this decision, which included: the necessity for the relief and efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties. *Id.*, 480 US at 171, 107 SCt at 1066.

In *Paradise*, the Court found that the 1:1 promotion ratio was necessary because of the police department's long history of pervasive discrimination against minorities in the upper ranks. *Id.*, 480 US at 171, 107 SCt at 1067. The Court then determined that the one-for-one requirement and its actual operation was flexible since the promotion requirements applied only when the department needed to make promotions and could be waived if no qualified minorities were available. *Id.*, 480 US at 178-179, 107 SCt at 1070. Moreover, the Court noted that the minority promotional ratio was temporary and flexible because it also contained an end date at which time the promotions should have eradicated the prior effects of discrimination. *Id.*, 480 US at 180, 107 SCt at 1071.

Finally, the Court unequivocally held that the one-for-one requirement did not impose an unconstitutionally unacceptable burden on innocent third parties. The Court held:

> As stated above, the temporary and extremely limited nature of the requirements substantially limits any potential burden on white applicants for promotion. It was used only once at the rank of corporal and may not be utilized at all in the upper ranks. Nor has a court imposed an 'absolute bar to white advancement'.

Appendix T

* * *

> The one-for-one requirement does not require the layoff and discharge of white employees and therefore does not impose burdens of the sort that concerned the plurality in *Wygant*. Because the one-for-one requirement is so limited in scope and duration, it only postpones the promotions of qualified whites. Consequently, like a hiring goal, it 'imposes a diffuse burden, ... foreclosing only one of several opportunities'. 'Denial of a future employment opportunity is not as intrusive as loss of an existing job', and plainly postponement imposes a lesser burden still. *Id.*, 480 US at 182-183, 107 SCt at 1072 (emphasis added) (citations omitted).

The Court also noted that a basic limitation, that minority troopers who were promoted had to be qualified, remained part of the promotional requirements.

Quite recently, the Court of Appeals for the Sixth Circuit also upheld a City's affirmative action plan, for its Police Department which was adopted as part of a consent decree. In *Vogel v City of Cincinnati, supra*, the District Court, in an attempt to eradicate the city's prior discrimination against blacks, entered a consent decree, which established a long-term goal to ensure that the number of blacks in all the sworn ranks within the police department approximated the number of qualified blacks in Cincinnati's work force. *Id.*, Slip Op at p. 3. On appeal the Sixth Circuit ruled that the decree did not require Cincinnati to unnecessarily hire or promote individuals, or to hire or promote a less-qualified individual. *Id.* The Sixth Circuit also ruled that the decree was temporary and terminated once the goals were met. *Id.*

Applying strict scrutiny, the Sixth Circuit then held the decree constitutional under the Fourteenth Amendment. The Court determined that Cincinnati was justified in implementing the plan since its past employment practices had resulted in a significant under-representation of blacks in the police department, in comparison to the number of minorities expected to be in the police department had no discrimination occurred. *Id.* at p. 11.

Several Federal District Courts have come to the same conclusion. In *Barcume, et al v City of Flint, et al*, ED Mich Case No. 84-8066, this Court, in an April 5, 1990, Memorandum Opinion and Order, substantially upheld, against an identical reverse discrimination claim, the same AAP at issue in this case. This Court specifically ruled that the City had a compelling governmental interest in eradicating the effects of its past employment practices which adversely impacted against blacks.[12] *Id.*, Slip Op at p. 4. The Court based its conclusion on the fact that the HRC made extensive findings of fact that the Police Department had both failed to comply with prior federal court remedial orders with respect to racial discrimination and had committed numerous acts of discrimination against blacks. *Id.* The Court then examined the AAP under the guidelines set forth in *Paradise, Wygant* and *City of Richmond v J.A. Croson Company*, 488 US 469, 109 SCt 706, 102 L Ed2d 854 (1989), and upheld the City's AAP as narrowly tailored to serve the compelling governmental interest.

Specifically, this Court first determined that the City's AAP was not overly intrusive under *Paradise* because the promotions of

[12] It should be emphasized that it is the City's position that the AAP is constitutional in its entirety, despite the Court's ruling in its April 5, 1990, Memorandum Opinion and Order, that the plan was unconstitutional to the extent non-Black minorities were included in the Plan.

non-minorities were at most only postponed, not totally abolished. *Id.*, Slip Op at 4-5. Second, the Court found the City's Plan was the least restrictive and most effective method by which to remedy past discrimination in promotions to the rank of Sergeant since the HRC had specifically found that the Department's adoption of a race-neutral promotional examination had not resulted in the promotion of minorities sufficient to eradicate the effects of its past discrimination. *Id.*, Slip Op at 5.

Third, the Court found the Plan flexible since minority promotions are only made when the Department actually needs to make promotions and only if the minority employee to be promoted is qualified for the position. *Id.* Moreover, the Court found that "the one-to-one ratio bears a relation to the percentage of minorities in the work force", and the Plan was temporary in that it was to be kept in place only until its goals had been attained and was to be reviewed annually. *Id.*, Slip Op at 5-6. *Accord: Detroit Police Officers Association v Young*, 765 F Supp 393 (ED Mich 1991) (city police department's voluntary 1-to-1 affirmative action plan promoting minorities to the rank of sergeant is reasonable and narrowly tailored to meet the compelling interest of the department to eliminate the past discrimination against blacks); *Fountain v City of Waycross, Georgia*, 701 F Supp 1570 (SD Ga 1988).

In the instant case, it is clear that the City had a compelling governmental interest in eradicating the past effects of any prior discrimination against minorities and that the AAP is narrowly tailored to serve that interest. Therefore, the AAP is constitutional.

A. The City Has A Compelling Governmental Interest To Eradicate The Past Effects Of Its Discriminatory Hiring And Promotion Policies.

Appendix T

To establish a compelling governmental interest, there must be a showing of prior discrimination by the governmental unit involved. *Wygant, supra*, 476 US at 274, 106 SCt at 1847. Judicial or administrative findings of prior discrimination by a governmental entity are more than enough to establish a compelling interest to institute affirmative action. *J.A. Croson Co., supra*, 488 US at ____, 109 SCt at 723; *University of California Regents v Bakke*, 438 US 265, 307, 98 SCt 2733, 2757, 57 L Ed2d 750 (1978) (Powell, J., concurring). In the instant case, there are both judicial and administrative findings that the City historically discriminated against minorities in its hiring and promotion practices.

As shown previously, the HRC concluded that during the 1970's, the City had violated several remedial orders of this Court, which resulted in a continued practice of race discrimination (Exhibit 5, p. 2). The HRC also concluded, as has this Court, that the Police Department's promotional exams were not developed and administered pursuant to federal uniform guidelines on employee selection. Rather, the tests were administered even though there was insufficient evidence to establish job relatedness or to rule out cultural bias against minorities (*Id.*, pp. 3,4). Based on this uncontroverted evidence, the HRC concluded that these discriminatory employment practices resulted in substantially larger numbers of non-minorities in all ranks of the Police Department, disproportionate to their representation in the relevant labor market (*Id.*, at pp. 2, 3, 4, 12 and 13).

Moreover, this Court has held on several occasions that the City's employment practices within the Police Department were racially discriminatory and resulted in a dearth of minorities within all ranks of the Department. See, *Holliman v Price, supra*; *Alfaro v Suber, supra*. Furthermore, this Court has already ruled that the City had a compelling governmental interest sufficient to

implement an affirmative action program because of the specific findings of historical discrimination against blacks by the City in its hiring and promotion policies. *Barcume, et al v City of Flint, supra.*

Thus, the record clearly reveals that there have been both administrative and judicial findings that the City has engaged in specific discriminatory conduct against minorities in its hiring and promotion policies. The HRC conducted several days of hearings and heard voluminous testimony from experts, Departmental employees and other governmental officials who testified to specific instances of discriminatory conduct or policies with respect to hiring and promotions within the Police Department. Moreover, this Court has held that the City's policies and practices with respect to hiring and promotions resulted in discrimination against minorities. Based on this evidence, there can be no question that the City had a compelling governmental interest sufficient to implement an affirmative action program.

B. The City's Affirmative Action Plan Is Narrowly Tailored To Serve The City's Compelling Governmental Interest.

Under the authority of *U.S. v Paradise* and its progeny, the City's AAP is narrowly tailored to serve its compelling governmental interest. There are numerous factors utilized to determine whether an affirmative action plan is narrowly tailored, which include:

1) the necessity for the relief and the efficacy of alternative remedies;

2) the flexibility and duration of the relief, including the availability of waiver provisions;

3) the relationship of the numerical goal to the relevant labor market; and

4) the impact of the relief on the rights of third parties.

U.S. v Paradise, supra, 480 US at 172, 107 SCt at 1066.

In considering these factors, the conclusion is compelled that the Plan is narrowly tailored and, therefore, constitutional.

1. It Was Necessary For The City To Provide The Relief To Minorities And There Were No Other Reasonable Alternative Methods Available.

In *Paradise*, the Supreme Court held that the district court's purpose of remedying the prior discrimination against blacks, coupled with the department's failure to effectively comply with prior court decrees, established that the relief was necessary and there were no other reasonable alternatives to implementing the 1:1 promotions. See, *Paradise, supra*, 480 US at 171-177, 107 SCt at 1066-1069. In the present case, the City, like the district court in *Paradise*, implemented a 1:1 promotion plan to provide relief to minority groups who were previously discriminated against by the City. Likewise, the HRC determined that the City's failure to abide by federal court remedial orders regarding discrimination in hiring and promotions required the implementation of affirmative action to comply with these orders (Exhibit 5, p. 11).

Moreover, the HRC concluded that all other alternatives to eradicate the effects of the prior discrimination[13] were inadequate

[13] The HRC specifically noted that the City had initiated or improved validation of exams, modification of certification procedures, dissemination of information regarding employment opportunities to protected classes, pre-employment inquiries in compliance with state and federal laws, and in service

and had failed to remedy the effects of the prior discrimination against blacks. In its 1990 *Barcume, et al v City of Flint* decision, this Court also held that the City's Plan "... was the least restrictive and most effective method by which to remedy past discrimination in promotions within the Department". *Id.*, Slip Op at 5. In light of the City's failure to properly effectuate this Court's remedial orders, and the failure of other measures to eliminate the vestiges of prior race discrimination, the HRC concluded, as did the district court in *Paradise*, that affirmative action was the only reasonable alternative remaining.

2. The City's Affirmative Action Plan is flexible and limited in its duration.

An affirmative action plan is "flexible" for purposes of the Equal Protection Clause if it does not require that the entity make unnecessary promotions and if the plan is limited in its duration. *See*, e.g., *Paradise*, *supra*, 480 US at 177-180, 107 SCt at 1070-1071; *Vogel*, *supra*, 959 F2d at 599. The City's Plan is flexible in that it provides that only qualified minorities can be promoted from the minority list (Exhibit 1, p. 1), the promotional lists remain in effect for a limited time period, and does not require that unnecessary promotions be made by the City (*Id.*). Moreover, the Plan is to remain in effect only until the goals are met.

The City's AAP, therefore, contains the same flexible provisions as those upheld by the Courts in *Paradise* and *Vogel*. Furthermore, *this* Court has held that the instant Plan is sufficiently flexible exactly because it does not require unnecessary promotions, does not require promotion of unqualified minorities,

---

training and re-training of personnel, but that "it is clear from the record that these initiatives have not sufficed to eliminate race/sex imbalances in the work force" (Exhibit 5, p. 13).

and is of limited duration. See, *Barcume, et al v City of Flint, supra*, Slip Op at pp. 5-6. Based on the foregoing, it is unquestionable that the City's AAP is "flexible" and narrowly tailored.

3. The numerical goals of the City's Affirmative Action Plan are in relation to the relevant labor market.

In the 1984 AAP, the City implemented a 1:1 promotion ratio to obtain its long-range goal of a minority representation in all ranks of the Police Department equal to what it would have been in the absence of prior discrimination. This long-term goal, which the City had predicted would be met by 1993, is related to and based upon the relevant labor market in the City of Flint. Moreover, the 1:1 ratio to reach that end goal is likewise related to the effective eradication of discrimination within the Sergeant ranks.

During 1984 hearings, the HRC was presented with an expert statistical analysis of the minority composition in both the Flint Police Department and the relevant labor market. The report concluded that 45% of those eligible to apply for an entry level position in the Department were minorities (Exhibit 6, pp. 4, 8). Those eligible to apply for the entry level positions, and thus those in the relevant qualified labor market, were individuals between the ages of 18-34 who had high school diplomas and who were presently expressing a desire to work (*Id.*, at p. 1). The report also considered the geographical areas from which the applicants came (*Id.*). Based on this undisputed analysis in 1984, (Exhibit 5, p. 4), the HRC determined that to remedy the past discrimination by the City, and to eradicate the current significant under-representation within all ranks of the Department, each rank should reflect proportionate representation of minorities. Such a result is constitutionally required based upon the extensive

history of race discrimination within the hiring and promotion practices of the Police Department.

In 1984, the HRC determined, based on substantial evidence, that all the ranks of the Police Department had a dearth of minority representation because of the City's past discrimination in hiring and promotions. Since the HRC determined that there existed a lack of minority police officers due to the prior discrimination, it is clear that "discrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by non-minorities". *Paradise, supra*, 480 US at 168, 107 SCt at 1065. Thus, had the HRC utilized the percentage of minorities in the police officer ranks to determine the appropriate representation of minorities in the sergeant rank, it would have been entirely ineffective in eradicating the prior discrimination by the City and would have again prolonged the relief to which minorities were entitled, and which the City had a compelling interest to eradicate.

Moreover, the statistics presented to the HRC, in fact, established that the minority composition of the police officer rank was approximately 8% higher than it was in the sergeant rank (Exhibit 6, p. 7). Thus, even if the Court concluded that it was appropriate to base the sergeant percentage on the percentage of minorities in the officer rank, the facts show that there was still a need to affirmatively promote qualified minorities to the sergeant level.

Furthermore, the 1:1 promotion ratio utilized by the City to reach its end goal has been upheld not only by this Court, but by numerous other courts, including the Supreme Court. See, *U.S. v Paradise, supra*; *Barcume, et al v City of Flint, supra*; *Baker v City of Detroit*, 483 F Supp 930 (ED Mich 1979), *aff'd subnom., Bratton v City of Detroit*, 704 F2d 878 (6th Cir 1983), *modified*,

712 F2d 222 (6th Cir 1983), *cert den.*, 464 US 1040 (1984); *Detroit Police Officers Association v Young*, 765 F Supp 393 (ED Mich 1991). Hence, the one-to-one promotion ratio was a narrowly tailored means to achieve the goal of eradicating the past discrimination within the City's Police Department.

4. The City's Affirmative Action Plan is not overly intrusive on the rights of third parties.

The final consideration as to whether the AAP is narrowly tailored is whether the Plan is overly intrusive on the rights of third parties. *Paradise*, *supra*, 480 US at 171, 107 SCt at 1066. As numerous courts have held, an affirmative action plan which does not require the discharge of non-minority workers, or the layoff of non-minority workers, is not overly intrusive on the rights of non-minority third parties. Because the City's AAP is limited in scope and duration, it only postpones the promotion of qualified whites and such a postponement imposes a slim burden. *Paradise*, *supra*, 480 US at 183, 107 SCt at 1072; *Vogel*, *supra*, 959 F2d at 599; *Barcume, et al v City of Flint*, *supra*. As in the aforementioned cases, the non-minority Police Department employees who are not immediately promoted because of the AAP are, at most, temporarily prevented from achieving the rank of sergeant. In no way is the AAP an "absolute bar to white advancement", *Paradise*, *supra*, 480 US at 182, 107 SCt at 1072, and, therefore, the one-to-one requirement does not impose an unacceptable burden on innocent third parties.

Appendix T

CONCLUSION

Based on the foregoing, Defendant CITY OF FLINT respectfully requests that this Honorable Court grant its Motion for Summary Judgment and enter an Order dismissing Plaintiffs' Complaint in its entirety and with prejudice.

Respectfully submitted,

KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C.

By _____

Donna R. Nuyen (P34636)
Christopher M. Murray (P43849)
Attorneys for Defendant City
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

Dated: May 18, 1992
WP:CMM323

FILED
Supreme Court, U.S.
MAR 24 1997
FILED
MAR 21 1997
CLERK
CLERK

No. 96-1211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN,

Petitioner,

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR, BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES McCLELLAN; and THOMAS HILGENDORF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

GREGORY T. GIBBS
(Counsel of Record)
MICHAEL J. KELLY
328 South Saginaw Street
Suite 9001
Flint, Michigan 48502
(810) 239-9470
Attorneys for Respondents.

Washington, D.C. • THIEL PRESS • (202) 328-3286

74 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT:

I. The Sixth Circuit Used The Correct Level of Scrutiny When Striking Down The Quota 7

II. The Sixth Circuit Did Not Improperly Shift The Burden Of Proof To The City 10

III. The Sixth Circuit Properly Found That The City's Statistical Evidence Was Not Adequate To Demonstrate A Compelling State Interest 12

A. The City Has Misstated The Court Of Appeal's Holding 13

B. The Sixth Circuit Did Not Erroneously Conclude That The City's Statistics Were Based Upon The General Population 14

C. The Sixth Circuit Properly Found That The Statistical Disparity Established By The City Of Flint Did Not Justify The Use Of A Racial Quota Of The Magnitude Used By The City Of Flint 17

IV. The Court Of Appeals Correctly Determined That The Quota Was Unconstitutional Without Plaintiff Filing A Cross Motion For Summary Judgment 19

A. The Court Of Appeals Properly Found The Quota Was Unconstitutional Without The Necessity Of A Cross Motion 19

B. The Court Of Appeals Did Not Improperly Address Issues Raised On Its Own 21

C. The Court Of Appeals Did Not Err In Finding It Was Not Persuaded There Was A Strong Basis In Evidence To Support The Quota 22

Page

V. The City Cannot Now Claim It Used A Racially Discriminatory Quota In Good Faith Reliance On Decisions That Such A Quota Would Not Be Scrutinized As A Suspect Classification 23

A. When The City Of Flint Utilized The Quota To Deny Plaintiff's Constitutional Rights, The Level Of Scrutiny Under Applicable Law Was Strict Scrutiny 24

B. The City Has Waived Any Claim That It Acted In Good Faith At The Time It Formulated The Quota By Failing To Raise That Defense Affirmatively In Its Pleadings. 26

C. This Court Should Reject The City's Argument That *Croson* Does Not Apply To This Quota 27

D. The Court of Appeal's Decision Finding The Racial Quota Unconstitutional Was Properly Held To Apply To The Promotions Denied To The Plaintiff In This Case Between 1987 And The Present Date 28

CONCLUSION 30

APPENDICES:

Appendix A – Status Conference Order Setting Procedure for Common Factual Basis on Constitutional Issue, 10-15-91 . . . . . 1a

Appendix B – Defense Counsel Nuyen's Letter of October 28, 1991, to Court. 3a

Appendix C – Excerpts from Deposition of Miles White (8/14/91). 12a

Appendix D – Excerpts from Deposition of Thomas Bugbee (8/16/91) 16a

Appendix E – Excerpts from Deposition of James A. Sharp, Jr. (9/30/91). 27a

Appendix F – City's Response To Plaintiff's Request For Admission 28a

Page

Appendix G – City's Affirmative Defenses 31a

Appendix H – Defendant City of Flint's Motion for Summary Judgment 34a

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. Pena, 515 U.S. ___, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) 7, 10, 17

Alfaro, et al. v. Suber, et al., Civil Action No. 613 (E.D. Mich. 1977) . . . . . *passim*

Arrow Office Supply Company v. City of Detroit, 826 F. Supp. 1072, 1076-1077 (E.D. Mich. 1993) 26

Barcume v. City of Flint, 41 F.E.P. Cases 783, 785 (E.D. Mich. 1986) 16

Billish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993), *en Banc* 23

Bosarge v. Department of Education, 5 F.3d 1414, 1416 fn. 4, (11th Cir. 1993), *cert. den.*, 114 S.Ct. 2720; 129 L.Ed.2d 845 (U.S. 1994) 21

Bratton v. City of Detroit, 704 F.2d 878, *modified at* 712 F.2d 222 (6th Cir. 1983), *cert. den.*, 464 U.S. 1040 (1984) 24, 25, 26, 28

Bufford v. Holiday, 133 F.R.D. 487 (S.D. Miss. 1990) 26

Chevron Oil Company v. Huson, 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971) 29

Concrete Works of Colorado v. City of and County of Denver, 36 F.3d 1513 (10th Cir. 1994), *cert. den.*, 115 S.Ct. 1315 (1995) 12

Curb v. MCA Records, 898 F. Supp. 586, 590 (M.D. Tenn. 1995) 22

DPOA v. Young, 989 F.2d 225 (6th Cir. 1993) 29

Ferguson v. Neighborhood Housing Services of Cleveland Incorporated, 780 F.2d 549 (6th Cir., 1986) 20, 22

Cases, continued: Page

Harper v. Virginia Department of Taxation, 509 U.S. 86, 125 L.Ed.2d 74, 113 S.Ct. 2510 (1993). 28, 29

Hazlewood School District v. United States, 433 U.S. 299, 53 L.Ed.2d 768, 97 S.Ct. 2736 (1977) 18

Holliman v. Price, 9 F.E.P. Cases (BNA) 1363 (E.D. Mich. 1973) 4, 8, 9

International Longshoremans Association AFL-CIO v. Seatrain Lines, Inc., 326 F.2d 916 (2nd Cir. 1964) 21

In Re Zweiben, 184 U.S. App. 167, 565 F.2d 742 (D.C. Cir. 1977) 26

Johnson v. Mortham, 915 F. Supp. 1574 (N.D. Fla. 1996) 11

Kellner v. Aetna Casualty and Surety Company, 605 F. Supp. 331 (M.D. Pa. 1982) 21

Maul v. Costan, 928 F.2d 784 (7th Cir. 1991). 26

Michigan Road Builders, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987), *affirmed*, 489 U.S. 1061, 103 L.Ed.2d 804, 109 S.Ct. 1333 (1989). 26

Middleton v. City of Flint, 810 F. Supp. 874, 879 (E.D. Mich. 1993) 2, 7, 16

Middleton v. City of Flint, 92 F.2d 396; (6th Cir. 1996), *reh. den.* . . . . . *passim*

Missouri Housing Development Commission v. Brice, 919 F.2d 1306, 1315 (8th Cir. 1990) 21

National Treasury Employees Union v. Internal Revenue Service, 247 U.S. App. 20, 765 F.2d 1174 (D.C. Cir. 1985) 26, 27

Regents of University of California v. Bakke, 438 U.S. 265, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978) 25

Renfro v. City of Emporia, 732 F. Supp. 1116 (D. Kan. 1990) 27

San Antonio Independent School District v. Rodriguez, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969) 25

Cases, continued: Page

Simpson v. Union Oil Co., 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969). 29

Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991), *cert. den.*, 504 U.S. 913 (1992). 12

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). 11

The City of Richmond v. J.A. Croson Company, 488 U.S. 469, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989) . . . . . *passim*

United States v. Paradise, 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). 7, 8, 14, 19

Washington v. Davis, 426 U.S. 229, 42 L.Ed.2d 597, 96 S.Ct. 2040 (1976) 17, 18

Wygant v. Jackson Board of Education, 476 U.S. 267, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986). 25, 26, 28

Statutes and Regulations:

U.S. Const., Fourteenth Amendment 1, 11, 18

MCLA 37.2101. 1

28 U.S.C. Section 2111 16

42 U.S.C. Section 1981 1

42 U.S.C. Section 1983 1

STATEMENT OF THE CASE

This case involves the use of a quota to make promotions on the basis of race by a municipality. The issue is whether a City can voluntarily use a quota to discriminate on the basis of race with respect to selection of applicants for promotion to the position of sergeant at the City of Flint Police Department. The City prefers to avoid using the term "QUOTA" and instead calls its "QUOTA" an "affirmative action plan" or the "Plan". However, the record below demonstrates that the City rejected the use of traditional affirmative action measures which would have had a less intrusive impact on the rights of non-minorities in favor of a politically popular quick fix quota which trampled on the rights of Plaintiffs because of their race.

This suit was filed in 1990. The Complaint alleges a violation of the Federal Constitution (Fourteenth Amendment) and Federal Statutes (42 U.S.C. Section 1981, 1983). It also alleges a violation of the Michigan Elliott Larsen Civil Rights Act which prohibits discrimination on the basis of race. (MCLA. 37.2102 et. seq.).

The suit was dismissed as a result of a motion for summary judgment filed by the City which contended that the quota was constitutional as a matter of law. The factual predicate for the City's motion was a proposed stipulation of facts submitted to the court by the City's counsel.[1]

---

[1]The City filed two separate motions for summary judgment which were addressed by the lower Court. The first motion was filed on October 11, 1991 and raised arguments that (1) Plaintiffs failed to state a claim under 42 U.S.C. Section 1981, (2) that all claims were barred by the statute of limitations, and (3) that Plaintiffs had failed to state a claim under the Michigan Elliott Larsen Civil Rights Act because the Michigan Civil Rights Commission had

[footnote continued]

On January 7, 1993, the lower court found that the quota was constitutional and granted the City of Flint's Motion for Summary Judgment. (Petitioner's Appendix at 39a). In support of this decision, the lower court found that the statistical disparity attested to by the City's expert, coupled with "powerful anecdotal accounts" of continuing discrimination in the police

---

approved the quota two years after it was implemented. On July 29, 1992, the District Court issued an Opinion denying the Motion to Dismiss the Federal claims, but granting dismissal of the Elliott Larsen Civil Rights Act claim because the quota had been approved by the Michigan Department of Civil Rights, albeit two years after it was implemented. (Petitioner's Appendix (hereafter App.) at 58a).

The second motion for summary judgment filed by the City raised the issue of the constitutionality of the quota. Prior to filing this motion, the Court held a status conference for the purpose of laying out procedure as to how this issue would be addressed. At the status conference, the parties agreed that the Human Relations Commission hearings held by the City of Flint and the report by the Human Relations Commission would form a common factual basis upon which the parties would rely to determine if the quota was constitutional. In addition, the City was directed by the Court to attempt to secure a stipulation of facts from not only these Plaintiffs but also from another set of Plaintiffs who were joined in the file for administrative purposes. (The other Plaintiffs had claims adverse to these Plaintiffs in that they desired to have the quota enlarged to include females). (Respondent's Appendix (hereafter "R. App." 2a; Status Conference Order of 10-15-91, paragraph 3, R.83). In lieu of a stipulation, the City specified all the facts it intended to rely on with respect to justifying its quota in a letter to the Court (10-28-91 letter of Nuyen to Court; R. App. at 5a). These facts were used as a basis for the Motion for Summary Judgment. The lower court found that these facts were stipulated facts. *Middleton v. City of Flint,* 810 F. Supp. 874, 879 (E.D. Mich. 1993). On appeal the City argued that the question of whether the quota was constitutional should be decided as a matter of law. While the Plaintiff did argue that there were questions of fact precluding summary disposition, the Plaintiff also argued, in the alternative, based on the facts asserted by the City of Flint, that the Court could find that the quota was unconstitutional as a matter of law. (Plaintiff's Opening Brief at 25).

department, provided a sufficient basis in evidence to support a compelling state interest to adopt the quota. The Court also found that the quota was narrowly tailored. (App. 39a).

On Appeal, the Court of Appeals for the Sixth Circuit reversed the lower court. In its Opinion the Sixth Circuit examined the evidence advanced by the City and concluded that the record did "not provide a strong basis in evidence that the Flint Plan served a compelling state interest" and the quota was not narrowly tailored to achieve the claimed interest. (App. 38a). Therefore, the Court reversed the District Court's grant of summary judgment and held that "the Flint Plan 1:1 quota for promotion was unconstitutional". (App. 38a). The City has petitioned this Court for Certiorari to review the opinion of the Sixth Circuit. This Petition should not be granted for the following reasons.

STATEMENT OF FACTS

Absent the use of a racial quota, the selection process for the position of sergeant at the City of Flint Police Department is a neutral multi-step process. Under that process, a notice of vacancy is posted, police officers employed by the city are permitted to apply, a written exam is administered and the results of the written exam for each applicant are calculated. The applicant's written score is combined with the applicant's seniority to create an eligibility list. A minimum score of 70 percent is required to be eligible for promotion and applicants are ranked on the eligibility list based on written scores and seniority. (Seniority points do not accrue beyond 5 years seniority).

The quota used in this case alters that process by using race as a criterion by imposing a one for one promotional

quota which requires the City to alternatively promote a minority applicant over a Caucasian applicant even if the Caucasian ranks higher on the eligibility list.

The quota is claimed to have been adopted in response to hearings held by the City of Flint's Human Relations Commission ("HRC") in 1984. The HRC completed a report which concluded that the quota was necessary based on its findings that there had been prior judicial determinations of discrimination in promotion to the position of sergeant at the police department, findings of general societal discrimination, testimonial pronouncements of discrimination, and certain statistics said to establish discrimination in promotion to the position of sergeant. (App. 94a).

The HRC finding was actually opposite of a finding of the United States District Court for the Eastern District of Michigan in the decision of *Alfaro v. Suber* in 1977. (App. 206a-207a). In *Alfaro,* the Court found that there was insufficient evidence to establish discrimination against African American applicants for the position of sergeant to warrant any relief claimed by the litigants in that case. *Alfaro v. Suber* (App. at 206a-207a).

Not only did the *Alfaro* decision find no basis for ordering any equitable relief with respect to quotas for promotion to the position of sergeant, it also found that because there was a general improvement in minority representation at the entry level police officer position within three and one half years preceding the decision (1973-1977) that the imposition of a quota for hiring at the entry level was also unnecessary. (App. 5a).[2]

[2]The HRC also cited the decision of *Holliman v. Price* as authority for the proposition that a quota was warranted. However, as noted by the Sixth Circuit, the Court in *Holliman* expressly stated that it would "decline at that time to order any particular quota in the hiring of blacks vis-a-vis whites or other non-black minorities". (App. at 3a).

An absence of past discrimination is documented in the record. Testimony by the Chief of Police Miles White was to the effect that he had been in the police department since 1964 and had never observed any intentional discrimination up to the time the quota was implemented. (R. 113, Deposition excerpt at p. 17, R. App. at 14a). The personnel director, Thomas Bugbee, who was employed at the City of Flint between 1968 and 1988 also categorically denied any practices by the personnel department to intentionally discriminate against black applicants in promotion. (R. 113, Bugbee deposition at pp. 10-15, R. App. at 17a-20a).

The HRC findings with respect to prior discrimination were questionable at best. Those findings were either based on testimony from persons tied to a mayoral administration predisposed to implement a quota or from a procedure allowing people to come in off the street and attest to their experience without being subjected to any procedure which would assure the veracity of their testimony. (App. 94a-95a).

The record in this matter establishes that the quota in 1984 was the product of racial politics that had its seeds in the election of the City's first elected African-American Mayor, James J. Sharp. At his deposition, Mayor Sharp confirmed that he ran on a platform advocating quotas to promote affirmative action in City employment. (R. 113; Sharp Deposition at 11; R. App. at 26a).[3]

---

[3] An unsuccessful Plaintiff in *Alfaro*, Richard Dicks, was appointed by Sharp as Deputy Administrator for Public Safety. (R. 113; Sharp Deposition at 14, R. App. at 29a). The Chief of Police and the Personnel Director both testified that before the hearings were held by the HRC to determine whether affirmative action in the form of a quota was necessary that Sharp was advo-

[footnote continued]

The HRC also made findings that a quota was necessary based upon general observations of societal discrimination. (App. 98a). The HRC ignored the City of Flint's personnel director's knowledge that less restrictive remedies than quotas were available in the form of validated test procedures known as assessment center techniques. (R. 113, Bugbee at 20-22, R. App. at 21a-23a).

The HRC also relied upon a statistical analysis prepared by Dr. Marc Bendick. This statistician based his study on a comparison of the general labor pool to the percentage of minority sergeants in the Department. In 1992 Bendick created a more refined labor pool. The actual labor pool used by the city to draw applicants for the position of sergeant is the pool of existing Flint police officers. The Plaintiff's Statistician did an analysis of the disparity between the actual labor pool and the percentage of sergeants and concluded that when the real labor pool was compared with the percentage of sergeants that no disparity existed beyond 1986. (App. 225a).

Although the Michigan Department of Civil Rights did approve the quota at the request of the City, it was done years after the quota was implemented. (R. 85, admission by City; R. App. at 29a).

The Sixth Circuit found in an opinion below that the HRC report and statistical evidence advanced by the City was insufficient to demonstrate a compelling state interest supporting the quota. The Court also found that there was insufficient evidence to establish that the quota was narrowly tailored. The City argues that this Court should grant Certiorari to review these issues. It is the

---

cating the implementation of the quota. (R. 113; Bugbee deposition at 25 and White deposition at 9; R. App. at 13a-14a, 23a, 24a). Clearly the record established that Sharp intended to implement a quota and that the "hearings" by the HRC were simply a vehicle for justifying what was already intended to be implemented.

Plaintiff's position that Certiorari is not properly granted for the reasons that follow.

ARGUMENT

I.

THE SIXTH CIRCUIT USED THE CORRECT LEVEL OF SCRUTINY WHEN STRIKING DOWN THE QUOTA.

According to the City, the Sixth Circuit ignored this Court's precedents and employed a level of scrutiny it refers to as "fatal in fact"[4] which no quota could withstand. The City claims that the Sixth Circuit made three departures from this Court's precedents.

The first departure claimed by the City is an alleged ruling by the Sixth Circuit that the evidence justifying a quota must show that there continues to be a nearly complete exclusion of minorities. The City has come up with this interpretation of the opinion below based on the Appellate Court's discussion of *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987). In *Paradise,* this Court upheld a 1:1 quota but only after the proof established a history of egregious discrimination. The City argues that the Sixth Circuit misconstrued the decision in *Paradise* to require evidence of "nearly complete exclusion of minorities" in order to justify a quota. This is simply not true.

In the lower Court, the City had relied heavily on *Paradise* as authority to justify its use of the 1:1 quota. The District Court accepted the City's argument and relied on *Paradise* to uphold the quota. *Middleton v. City of Flint, supra,* 810 F. Supp. 881-883.

---

[4]The term fatal in fact is a catch phrase the City took from *Adarand Constructors, Inc. v. Pena, supra.* However, the scrutiny used by the Sixth Circuit was taken from *The City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989).

On appeal, the Plaintiffs pointed out that *Paradise* was a case with facts which were substantially different from the case at hand. Unlike the City of Flint situation, the factual predicate in *Paradise* for establishing a strong basis in evidence that discrimination occurred was the long-standing intentional discrimination by the employer. *Paradise* was the only Supreme Court decision where a quota close to the magnitude used by the City of Flint in this case was upheld. However, in *Paradise* the quota was actually less restrictive because it was only approved for a limited duration. Plaintiffs argued that the factual dissimilarities between the history giving rise to the need for a quota in *Paradise* and the history in the City of Flint made *Paradise* inapplicable. The Sixth Circuit agreed. (App. 14a-16a).

The second departure from precedent asserted by the City is its claim that the Sixth Circuit incorrectly concluded that because the decisions in *Holliman* and *Alfaro* did not order one for one quotas such a plan could not be justified as a necessary remedy in 1984 as a matter of law. The City then argues that the Sixth Circuit's observation that the Court did not order a quota was tantamount to the Sixth Circuit refusing to follow U.S. Supreme Court decisions "holding that a judicial finding of discrimination is not a necessary pre-requisite to the adoption of a quota" (City's Brief at 9). Once again, the City's argument is based on misstated facts. Nowhere in its decision does the Sixth Circuit hold that a prior judicial determination of past discrimination is necessary to establish a compelling State interest for the implementation of a quota. What the Court of Appeals did was observe that, even when the disparity was more substantial than disparities that existed when the City voluntarily imposed a quota, the Courts found that a drastic remedy in the form of a quota was not necessary:

> **"As the record before us makes clear, the federal courts have been invited by litigants for more than twenty years to order hiring and promotion quotas in the Flint police department quota, and the courts have refused to do so.** Those courts were presented with the pre-1973 history, just as the HRC was during its public hearings. Similarly, those courts were offered statistical analysis. They found that discrimination existed before 1973, but they also found that the police department was taking steps to rectify past wrongs. **Since the time of *Holliman* and *Alfaro*, minority representation on the police force continued to increase, in some measure because of the litigation that brought the police department's practices under the watchful eyes of the courts. Minority promotions to sergeant increased at an even sharper pace, again in an atmosphere marked by the awareness that the courts were watching, but without the imposition of quotas by the court. Notwithstanding their findings of past discrimination in the years before 1973, those pre-*Croson* courts consistently found a quota on hiring or promotion to be an unnecessarily drastic remedy, in light of the circumstances before them."** (emphasis added) (App. 19a).

The third alleged departure asserted by the City is based on its claim that the Sixth Circuit held that the impact of a promotional remedy on non minorities is "severe as a matter of law" (City's Brief at 9-10). Once again the City misconstrues the Court of Appeals holding. The Court did not hold that a promotional remedy is so severe so as to require finding it to be unconstitutional as a matter of law in every case. Rather, the court held where undisputed facts, such as those here, establish the denial of a significant promotional opportunity for a substantial period of time then it will find such a quota has a significant adverse impact on the rights of third parties

so as to violate the requirement that the remedy be narrowly tailored. (App. 38a).

Given the above, this court should not find that the Court of Appeals departed from this Court's standards for strict scrutiny.

II.
THE SIXTH CIRCUIT DID NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO THE CITY.

In Argument II of its Petition, the City claims that the Court of Appeals erred in shifting to the City a "heavy burden of proving the plan was constitutional". According to the City, once it is shown that it is using a racial preference it need only articulate some legitimate basis for its racial quota and the burden of proof and persuasion will remain with the Plaintiff to demonstrate no compelling interest exists to use a racial quota. (City's Brief at 11-13). The City's position on this issue is erroneous for two reasons.

The first reason is that the City incorrectly states that the Sixth Circuit used the improper burden of proof when scrutinizing the quota. Recently, this court reiterated the proposition that governmental racial classifications are subject to the strictest scrutiny. *Adarand Constructors Inc., v. Pena,* 515 U.S. ___ , 115 S.Ct. 2097, 132 L.Ed.2d 158, 179-180 (1995), held that "**any person of whatever race, has the right to demand that any governmental agency justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny**". (emphasis added). Accordingly, the Court of Appeals recognized that the governmental actor here must justify its racial classification (App. 18a).

The second reason the City's argument is incorrect is that the City's suggested analysis is the analysis used in

Title VII litigation, not Fourteenth Amendment litigation. See *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). While some Fourteenth Amendment cases have suggested that the Plaintiff retains the burden of persuasion when challenging a suspect classification, none of these cases has ever held that the burden on the part of the government is simply to "articulate" a compelling state interest. This Court has never held that the level of scrutiny required to justify a governmental classification based on race should be reduced to the minimal scrutiny used in Title VII litigation.

Assuming for the sake of argument that the Plaintiffs have the burden of persuasion in this matter, relaxing the government's burden in justifying the use of a racial classification to the degree that the City suggests would defeat the very purpose of strict scrutiny review. In *Johnson v. Mortham,* 915 F. Supp. 1574 (N.D. Fla. 1996), the court found that the Plaintiff retained the burden of persuasion on all issues. It also found that such a burden did not require the Plaintiff to prove a negative or even produce any witnesses or evidence in opposition to the justification asserted by the government for the racial classification. Rather, the Court noted that in order to meet its burden of persuasion the Plaintiff need only persuade the court with an "argument" that the government has not produced sufficient evidence demonstrating a compelling governmental interest. *Johnson v. Mortham, supra,* 915 F. Supp. at 1580.

In the case at hand, the parties had stipulated to a procedure whereby the City would advance all the facts it believed justified the quota in order to establish a compelling state interest. This procedure was memorialized in a Pre-trial Order. (R. 83 Status Conference Order of 10/15/91, paragraph 3; R. App. at 2a). In addition, the

Plaintiffs produced evidence and raised arguments to overcome the justification advanced by the City in favor of the racial quota. Under the circumstances, the Court of Appeals was correctly persuaded by the Plaintiffs that the City had not made a sufficient showing to satisfy strict scrutiny review.[5]

III.
THE SIXTH CIRCUIT PROPERLY FOUND THAT THE CITY'S STATISTICAL EVIDENCE WAS NOT ADEQUATE TO DEMONSTRATE A COMPELLING STATE INTEREST.

The Court of Appeals found the City's statistical analysis did not demonstrate a compelling state interest justifying the racial quota because the statistics were "misleading and conclusory". (App. 25a-26a). The City

---

[5] The City has cited to the cases of *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991), *cert. den.*, 504 U.S. 913 (1992); *Concrete Works of Colorado v. City of and County of Denver*, 36 F.3d 1513 (10th Cir. 1994), *cert. den.*, 115 S.Ct. 1315 (1995) for the proposition that the lower court in this case applied an improper burden of proof. (See City's Brief at 12, fn. 10). Both of these cases are distinguishable. *Stuart* involved a consent decree, not a voluntarily implemented quota. Moreover, in *Stuart* there was a long standing history of past proven discrimination through litigation in the federal courts. In *Stuart*, it was not just statistics that the Court found to provide a strong basis in evidence for remedial relief but also the past history of discrimination, unfair examinations and no evidence rebutting the evidence submitted. See *Stuart, supra*, at 452-453. The *Concrete Works* decision is also substantially different than the case at hand. There the Court considered a challenge to a set aside program implemented by the City through an ordinance. The Court found that the burden of production was on the City to demonstrate a strong basis in evidence for the implementation of this race conscious Ordinance. The Court noted that *Croson* provides that the strong basis in evidence will be evaluated on a case by case basis. While the Court did find that a burden of persuasion remained with the Plaintiff, the Court in this case found that the Plaintiff met its burden of persuasion under the procedure agreed to.

argues the Court of Appeals erred. Each argument is addressed below.

A. The City Has Misstated The Court of Appeal's Holding.

When addressing the statistical issues in this case, the court of appeals noted that the issue of which labor pool population sample was appropriate was the subject of debate between the parties. In its opinion, the appellate court noted that in "actual practice" there is only one population group that is eligible for promotion to the rank of Flint police Sergeant. That relevant statistical pool is the population of previously hired Flint police officers." *Middleton,* App. 25a. However, the court expressly stated that due to the "incomplete and misleading nature" of the statistical analysis advanced by the city, that it was not necessary to decide which population sample was appropriate:

> **"Because we hold that Dr. Bendick's statistical labor-force analysis was incomplete and therefore irrelevant to the question before the district court, we need not decide at this time whether the district court erred by choosing to use the city's general labor force as its relevant population sample, rather than limiting its analysis, as plaintiffs urge, to the population of already-hired Flint police officers, of whom Blacks comprised 17.3% in 1984."** (emphasis added). (App. 23a, footnote 8).

Incredibly, in an effort to mislead this Court into thinking the court of appeals failed to follow *Paradise,* the city took the court's observation about the actual hiring practice being from the pool of existing police officers and claimed the court specifically held that this labor pool was the appropriate pool to use for a statistical analysis.

(City's brief at 13). Therefore, this argument by the City should be rejected.

The City also incorrectly argues that *Paradise* sets forth an ironclad rule that requires an analysis incorporating the alleged effect of discrimination at the entry level as influencing discrimination at the promotional level. (City's Brief at 14). *Paradise* did not set down an ironclad rule to determine what a qualified labor pool is. Rather, *Paradise* found the statistical analysis in that particular case coupled with evidence documenting 37 years of egregious intentional discrimination was sufficient to justify a quota for a limited duration. The appropriate labor pool used in a statistical analysis will necessarily vary on a case by case basis. As noted in *Croson,* the relevant inquiry is whether the labor pool reflects the qualified pool of applicants. In this case the undisputed facts were that applicants were not hired from the outside labor force. (R. App. at 15a, Miles White Deposition p. 27). Also, here the federal courts had previously examined the city's entry level hiring practices years before the quota was implemented and found hiring quotas were not necessary due to advances made in minority hiring.[6] Under the circumstances, it was not improper for the court of appeals to reject the analysis used by the cities statistician.

B. The Sixth Circuit Did Not Erroneously Conclude That The City's Statistics Were Based Upon The General Population.

The City claims the Court of Appeals rejected Dr. Bendick's statistics because they were "general labor statistics."

---

[6] From 1972-1975, 15 of 29 new police officers hired were minority. Between 1974 and 1975, 56 out of 105 entry level officers hired were minority. (App. 3a).

The Court of Appeals rejected the City's statistics because they were "incomplete, inaccurate, and misleading." (App. 25a-26a). In footnote 8, the court pointed out how the statistics misled the casual observer into believing only two or three minority officers were hired in entry level positions in the 1970s, when, in fact, the City admitted through its own police chief that there were fifteen minorities out of twenty-nine officers hired in 1972 and there were fifty six minorities out of one hundred and five total officers hired in 1974 which constituted 53.5 percent of the police officers hired between 1974 and 1975. This contradicted Bendick's claim that there was a "minority shortfall" in the number of Sergeants because of only a few minority hires in the seventies. This is just one example of why the Court of Appeals concluded the statistics were misleading.

The City also claims the Court of Appeals improperly referred to Bendick's statistics as "general labor statistics". The cause for the City's concern over the use of this nomenclature stems from the language in the decision of *The City of Richmond v. J.A. Croson Company,* 488 U.S. 469 (1989). *Croson* holds that, where a job has special qualifications, statistics showing a disparity between the racial composition of the employer's work force and the racial composition in the general population will not support a compelling state interest justifying the use of any affirmative remedies based on race let alone a quota. *City of Richmond v. J.A. Croson Company, supra,* 488 U.S. at 501-502.

The *Croson* decision was handed down *after* the first report prepared by Bendick, and *after* the City published its HRC findings which contained statistics which the City claims supported the use of the quota. The record demonstrates that the City's HRC specifically stated it relied on general population statistics when it recom-

mended a quota with an end goal of securing forty five percent minority sargeants. (App. 99a, paragraph 20-21). Indeed, in other litigation involving this same quota before *Croson,* the City specifically represented to the federal courts that the HRC found general population statistics were the appropriate basis for its target of hiring forty five percent minority sargeants. See *Barcume v. City of Flint,* 41 F.E.P. Cases 783, 785 (E.D. Mich. 1986), which involved the same quota where the court noted that the HRC was relying on general population statistics. It was only after the decision in *Croson* and the instant litigation was initiated that the City changed the nomenclature and claimed that it was using specialized labor force statistics.[7] Given this background, even if the Court of Appeals had found the City of Flint used general population statistics as opposed to labor market statistics it would not have constituted error since such a finding is supported by the record. Moreover, even if such a finding is erroneous, it is harmless here because the misleading and conclusory nature of the statistics used by the City provides an independent ground to affirm and precludes a finding that the substantial rights of the City are adversely affected. 28 U.S.C. Section 2111.

---

[7] In a new statistical analysis created by *Bendick* for this litigation in 1992, *Bendick* claimed that he used specialized labor force statistics all along. Since the change in nomenclature coincided with *Croson's* disapproval of the previously referred to statistics, Plaintiff raised this issue in the Court below. However, the district court sided with the City finding as a matter of law that labor market statistics were used. *Middleton v. The City of Flint, supra,* at footnote nine. Plaintiff raised this issue on appeal. The City argued on appeal that the lower court could properly find the labor market statistics were used as a matter of law. (City's brief on appeal to the Sixth Circuit at 17-18, footnote 14).

C. The Sixth Circuit Properly Found That The Statistical Disparity Established By The City Of Flint Did Not Justify The Use Of A Racial Quota Of The Magnitude Used By The City Of Flint.

The City asserts that the Sixth Circuit held "that a gross statistical disparity can never sustain an affirmative action plan". This is not at all what the Court held. Rather the court held as follows:

> ". . . we hold that a disparity between the percentage of a protected class employed in a particular work force or occupation and the raw percentage of class members in a regional pool, standing alone, cannot be "a strong basis in evidence" sufficient to justify hiring or promotion quotas. That is, it is permissible to remedy discrimination. It is not permissible to remedy disparity without more". *Middleton v. City of Flint, supra,* App. at 22a-23a.

This language is consistent with recent decisions by this court. In *Adarand Constructors, Inc. v. Pena, supra,* this court readopted the standards found in *Paradise* which held that evidence of "pervasive, systematic and obstinate conduct" was needed to justify a very "narrowly tailored race-based remedy". *Adarand Constructors, Inc. v. Pena, supra,* 515 U.S. ___ , 32 L.Ed.2d 158, 199, 115 S.Ct. 2097 (1995). Moreover, while this court observed in *Croson* that "where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern of discrimination under Title VII" this court did not hold that such a disparity would necessarily provide a sufficient basis to justify the use of a 1:1 *racial quota* under the Fourteenth Amendment. In *Washington v. Davis,* 426 U.S. 229, 42 L.Ed.2d 597, 96 S.Ct. 2040 (1976), the Court held that showing disparity alone was not enough to

establish a prima facie violation of the Fourteenth Amendment. *"Our cases have not embraced the proposition that a law or other official act without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact". Washington v. Davis, supra,* 426 U.S. at 238. The *Davis* court held that while evidence of disparity is probative, showing disparity alone is not enough to show a finding of unconstitutional racial discrimination which would warrant remedial relief under the Fourteenth Amendment to undue such racial discrimination. The same consideration should apply to an analysis in this case. For the government to establish that the constitution requires the drastic remedy of a one for one racial quota it should be required to establish that the evidence warrants the constitutional remedy. Since a showing of disparity without more is not enough then the City's statistics are inadequate.

A gross statistical disparity alone may never justify a quota under the rationale of *Croson* not simply because it fails to provide a strong basis in evidence for any kind of remedy but because it fails to provide a strong basis in evidence to justify a *burdensome racial quota.* Under *Croson,* one reason for requiring findings of the City's basis in evidence for taking action based on race is "to define both the scope of the injury and the extent of the remedy necessary to cure its effects". *Croson, supra* 488 U.S. at 510. A finding of disparity alone may only justify the use of a remedy with a less restrictive impact on third parties like test validation, removal of unrelated degree requirements or the intensification of minority recruitment. See *Hazlewood School District v. United States,* 433 U.S. 299 (1977). However, a gross disparity coupled with evidence of pervasive, long standing intentional discrimination may justify remedies with

more burdensome impacts such as quotas. See for example *United States v. Paradise, supra.* Given the circumstances in this case establishing the absence of intentional discrimination, the findings of lower Federal Courts that quotas were unnecessary just a few years prior to the implementation of the quota in issue, and the misleading and incomplete nature of the City statistics, the Court of Appeals did not err in finding the disparity relied on by the City did not justify the use of the racial quota.

IV.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE QUOTA WAS UNCONSTITUTIONAL WITHOUT PLAINTIFF FILING A CROSS MOTION FOR SUMMARY JUDGMENT.

The City states that a question presented on this appeal is whether the Court of Appeals could enter a Judgment finding the quota unconstitutional without the Plaintiff having filed a cross motion. In the body of its brief, the City contends that the Court of Appeals improperly abandoned its inquiry as to whether there was a genuine issue of material fact for trial and instead resolved factual issues as a matter of law (City's Brief at 18-22). The City goes on to argue that the Court of Appeals improperly addressed issues that were not raised by Plaintiff. The City's argument on this issue is an attempt to abandon the agreements and concessions on procedure that it made below.

A. The Court Of Appeals Properly Found The Quota Was Unconstitutional Without The Necessity Of A Cross Motion.

At a status conference below, the parties agreed that the HRC hearings and report would form a common factual basis upon which the parties would rely to determine if the quota was constitutional. The City was directed to

try to secure a stipulation on this point. (Status conference order of 10-15-91, paragraph 3, R. 83, R. App. at 2a). In lieu of a stipulation, the City specified all of the facts it intended to rely on with respect to justifying its quota in a letter to the court. (R. App. at 5a, 10-28-91 letter of Nuyan to court). These facts were used as a basis for the Motion for Summary Judgment. On appeal, the City argued the question of whether the quota was constitutional should be decided as a matter of law.

One reason it was not error to hold the quota unconstitutional as a matter of law is that the City agreed that the HRC report would form a common factual ground on which to judge the constitutionality of the quota.[8] Therefore, there was no reason to file a cross motion since the procedure to determine the issue of the constitutionality of the quota from the perspective of either party was agreed to. The City is estopped from arguing in favor of using a different procedure at this late date. *Ferguson v. Neighborhood Housing Services of Cleveland, Inc.*, 780 F.2d 549 (6th Cir., 1986).

Under the Federal Rules of Civil Procedure a cross motion for Summary Judgment is not necessary for a Court to enter summary judgment in favor of the party opposing summary judgment. It has long been recognized that "the grant of summary judgment to a nonmoving party is a relatively frequent occurrence in the Federal Courts" because such relief is in keeping with the objective of Rule 56 to expedite the disposition of cases and Rule 54 to grant relief even if relief is not demanded.

---

[8] In accordance with the status conference order the City represented to the Court that all events and documents it submitted in support of the quota were "the events upon which the . . . City of Flint will rely to establish the constitutionality of the AAP as originally constituted in 1984" and "the documents upon which the City would rely to establish the constitutionality of the plan". (R. App. at 5a Nuyan letter of 10-28-91).

Kellner v. Aetna Casualty and Surety Company, 605 F. Supp. 331 (M.D. Pa. 1984). This principle extends to judgments on appeal. *Bosarge v. Department of Education*, 5 F.3d 1414, 1416 fn. 4, (11th Cir. 1993); *cert. den.*, 114 S.Ct. 2720; 129 L.Ed.2d 845 (U.S. 1994); *International Longshoremans Association AFL-CIO v. Seatrain Lines, Inc.*, 326 F.2d 916, 921, fn. 2 (2nd Cir. 1964). Thus, a cross motion was unnecessary.

B. The Court Of Appeals Did Not Improperly Address Issues Raised On Its Own.

The City claims that the Sixth Circuit improperly extrapolated from Plaintiffs testimony on the record that ten points had been added to all the scores of the 1987 exams. However, this fact was established by the City's own admissions. When examining the issue relating to the quota's flexibility and duration to determine if the plan was narrowly tailored, the appellate court focused on documents which established that a minimum score of 70% was necessary to be qualified as sergeant, and when no minority candidate achieved the minimum passing score of 70% in 1987, that ten points were added "to all test takers thereby altering otherwise failing grades as low as 60% into qualifying scores". (App. 3a). Moreover, counsel confirmed this was the practice at oral argument. (App. 3a). Given the City's admission on this issue the court properly concluded that the alterations of grading destroyed the City's claim that the quota did not result in unqualified persons being promoted. (App. 3a). The City is bound by the documents that it creates as well as the admissions of counsel. Admissions and pleadings are binding on the parties and they support Summary Judgment against the party making such admissions. *Missouri Housing Development Commission v. Brice*, 919 F.2d 1306, 1315 (8th Cir. 1990). Statements made by counsel in the course of litigation bind a party on Summary Judg-

ment for purposes of both the lower court and appellate court proceedings. *Ferguson v. Neighborhood Housing Services of Cleveland Incorporated,* 780 F.2d 549 (6th Cir. 1986); *Curb v. MCA Records,* 989 F. Supp. 586, 590 (M.D. Tenn., 1995).

The City also complains about the Sixth Circuit's observations that the City's statistical analysis was not a reliable indicator of past discrimination. One complaint raised by the City is the court's observation that the statistician assumed that minority men and women as a group are exactly inclined as non-minority men and women as a group neither more so nor less so – to seek employment in the police department, and they are exactly as qualified under nondiscriminatory conditions. (App. 26a). The court found this assumption to be too conclusory and misleading. This was not impermissible issue raising or fact finding by the Court of Appeals. This court made similar observations in *Croson* when it found no basis in evidence from statistics advanced to support a minority set aside program because those statistics rested on "the unsupported assumption that white prime contractors will not hire minority firms". Clearly, it is not improper for an appellate court to disregard "statistics" based on unsupported or conclusory assumptions.[9]

C. The Court Of Appeals Did Not Err In Finding It Was Not Persuaded There Was A Strong Basis In Evidence To Support The Quota.

While the issue of whether there is a strong basis in evidence supporting a quota is a legal question, the City contends that underlying this issue are factual determin-

[9] Similarly, the City's complaint regarding the minority population shift observations by the court is without merit. If such an observation was erroneous it was harmless. Nothing in the Court's opinion holds that this population shift negated the evidentiary value of the City's statistics. (App. 27a, footnote 9).

ations about the accuracy and validity of the municipalities evidentiary support for the quota. According to the City, the court should have remanded the case for trial on the underlying facts. This argument is not correct because the Sixth Circuit accepted the underlying factual support offered by the City to be true and found those facts, even if undisputed, were inadequate to find that there was a strong basis in evidence to support the use of the racial quota. The court did not disagree with the facts, it disagreed with the legal conclusion that the City asked it to draw from these facts.[10]

V.

THE CITY CANNOT NOW CLAIM IT USED A RACIALLY DISCRIMINATORY QUOTA IN GOOD FAITH RELIANCE ON DECISIONS THAT SUCH A QUOTA WOULD NOT BE SCRUTINIZED AS A SUSPECT CLASSIFICATION.

In Argument V of its Brief the City claims for the first time in this litigation that it acted in good faith when adopting the racial quota. The City claims that the law was unclear when it adopted the quota and that it was relying on Sixth Circuit precedent as authority for the proposition that it could utilize a racial quota from 1984 through 1993 without its practices being scrutinized

---

[10]The City also suggests that the Sixth Circuit should have remanded this matter just as the Seventh Circuit did in the case of *Billish v. City of Chicago*, 989 F.2d 890 (7th Cir. 1993), *en banc*. However, such action would be inappropriate in this case. In *Billish*, there was a dispute over whether a decision to immediately appoint a black captain rather than wait two months to appoint from a list of candidates derived from a racially neutral test was a necessary decision or a racially motivated decision. See *Billish v. City of Chicago*, *supra*, 989 F.2d at 894. In this case there was no dispute that each decision made for promotion to the position of sergeant was based on racial motivation in the sense that it was based on a racial quota. Therefore, the same rationale for the remand for a factual determination found in *Billish* does not apply in this case.

strictly under the Fourteenth Amendment. (City's Brief at 22-25). According to the City, even under this Court's ruling in *Croson,* its racial quota should not be struck down because the Flint City Council was not controlled by an African-American majority as was the case in *Croson* and therefore the factual predicate for the conclusion of racial politics playing a role in the *Croson* quota was not present in the City of Flint case. (City's Brief at 25). Finally, the City argues that the strict scrutiny standard applicable to racial quotas should not be retroactively applied to protect the constitutional rights of the Plaintiff in this case. Each argument is without merit.

A. When The City Of Flint Utilized The Quota To Deny Plaintiff's Constitutional Rights, The Level Of Scrutiny Under Applicable Law Was Strict Scrutiny.

The City claims that when the plan was put into effect in 1984 that the applicable level of scrutiny was not strict scrutiny, but a "reasonableness" standard as enunciated in *Bratton v. City of Detroit,* 704 F.2d 878, modified at 712 F.2d 222 (6th Cir. 1983, *cert. den.,* 464 U.S. 1040 (1984).[11]

The City cannot seriously claim that it was unaware of the likelihood that the Courts would find that it was violating the fundamental rights of its police officers by using a racial quota in light of the history of litigation pertaining to the City of Flint itself in which the lower

[11] According to the City, this Court did not delineate a clear standard for the level of scrutiny until *Croson* was decided. Because of this, the City reasons that it should not have been held accountable for violating Plaintiff's constitutional rights in promotion from 1984 to 1993 because its decision was based on a reasonableness standard approved in *Bratton* and its quota was reasonable under the *Bratton* test.

federal courts found insufficient evidence of discrimination which would justify the implementation of a quota. *Alfaro,* (App 206a-207a). Moreover, the City's suggestion that precedents from this Court at the time caused it to believe that it could implement a racial quota without facing intense scrutiny suggests that the City was ignoring decisions which made it clear that such classifications would be closely scrutinized. For decades this Court has observed repeatedly that "the highly suspect character of classifications based on race, nationality, or alienage is well established". *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 105 (1973) (Marshall Dissenting; referring to majority precedent for strict scrutiny).

In 1978, this Court stated in *Regents of University of California v. Bakke,* 438 U.S. 265, 289-290, 57 L.Ed.2d 750, 98 S.Ct. 2733 (1978), "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection then it is not equal".

In the case at hand the actual promotion denials which violated Plaintiff's constitutional rights occurred between 1987 and 1993. (App. 60a). By 1986, the City knew that this "court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination". *Wygant v. Jackson Board of Education,* 476 U.S. 260, 268, 90 L.Ed.2d 260, 106 S.Ct. 1842 (1986).

The City's reliance on *Bratton* for the proposition that it could ignore this Court's warnings and trample on the rights of non-minority officers just does not wash in this case. *Bratton's* factual predicate contained evidence of systematic intentional discrimination while the City of

Flint's did not. *Bratton's* historical background contained no unchallenged Federal Court ruling finding insufficient evidence of past discrimination which would warrant the use of a quota while the City of Flint's did. However, even without the difference in the facts and the history between the city of Detroit in *Bratton* and the city of Flint here, the City could not rely on the Sixth Circuit precedent in *Bratton* in making its promotions on the basis of race after 1986 because by 1986 the reasonableness standard in *Bratton* had been expressly overruled in *Wygant.* Moreover, by 1987 the next decision addressing the level of scrutiny in the Sixth Circuit specifically overruled the reasonableness test in *Bratton* in favor of strict scrutiny. *Michigan Road Builders, Inc. v. Milliken,* 834 F.2d 583 (6th Cir. 1987), affirmed, 489 U.S. 1061, 103 L.Ed.2d 804, 109 S.Ct. 1333 (1989); *Arrow Office Supply Company v. City of Detroit,* 826 F. Supp. 1072, 1076-1077 (E.D. Mich. 1993).

B. The City Has Waived Any Claim That It Acted In Good Faith At The Time It Formulated The Quota By Failing To Raise That Defense Affirmatively In Its Pleadings.

The City never raised the claim that it was acting in good faith in the pleadings below. It is not found in their Answer, in their Affirmative Defenses, or in their pleadings seeking Summary Judgment. (R. App. at 31a-36a, Affirmative Defenses and Motion). The defenses of good faith and good faith immunity are case determinative legal issues that must be raised before extensive time is invested in the litigation. *Bufford v. Holiday,* 113 F.R.D. 487 (S.D. Miss. 1990). The failure to raise these issues constitutes a waiver of the good faith defense and precludes its consideration on appeal. *In Re Zweiben,* 184 U.S. App. 167, 565 F.2d 742 (D.C. Cir. 1977); *Maul v. Costan,* 928 F.2d 781 (7th Cir. 1991); *National Treasury Employ-*

ees Union v. Internal Revenue Service, 765 F.2d 1174, 1176, footnote 1 (D.C. Cir. 1985); *Renfro v. City of Emporia,* 732 F. Supp. 1116 (D. Kan. 1990).

C. This Court Should Reject The City's Argument That *Croson* Does Not Apply To This Quota.

The City argues *Croson* does not apply. According to the City, the factual predicate is different because in *Croson* the City Council was dominated by African-Americans while the City of Flint Council was not. (City's Brief 25-26). The City reasons that this Court's basis for finding racial politics played a role in *Croson* was the African-American control over the process.

The City's argument ignores the fact that it is undisputed in this case that racial politics played a role in the implementation of the racial quota. In 1977 the lower federal court held in the case of *Afaro v. Suber, supra* that there was insufficient evidence of discrimination with respect to promotion to the position of Sergeant to justify the implementation of a quota or any other kind of affirmative relief. *Afaro v. Suber, supra.* In 1983, the City's first African-American Mayor, James J. Sharp, was elected by running "on a platform that included pledges to implement 'affirmative action plans' that would increase the City's minority hiring and promotion efforts". (App. 5a). Police Chief Miles White admitted in his deposition that before any hearings were held by the HRC he was aware that the Mayor advocated an Affirmative Action Plan. (R. App. at 13a, Deposition of Miles White at 9). The new administration was backed by at least one litigant (Richard Dicks) who was unsuccessful in convincing the federal court to implement a quota in the case of *Afaro v. Suber.* Mayor Sharp named former Plaintiff Richard Dicks Deputy City Administrator of Public Safety after his election. (App. 5a). Personnel

Director Thomas Bugbee was also aware that Sharp was advocating the use of a racial quota even before it had its "fact finding" hearings through the HRC. (Bugbee Deposition at 20-22, R. App. at 21a-23a). Bugbee was also aware of remedies less restrictive than a quota that were available for use as affirmative remedies in the promotional process but he was never called as a witness by the Sharp administration to testify. (Bugbee Deposition *id.*). Clearly, the racial politics at the City of Flint equaled the racial politics in *Croson.*

D. The Court of Appeal's Decision Finding The Racial Quota Unconstitutional Was Properly Held To Apply To The Promotions Denied To The Plaintiff In This Case Between 1987 And The Present Date.

The City claims the decision in this case announces new law which should not be retroactively applied to the City's conduct. They also acknowledge that even when they couch their argument under the terms above that this Court would have to revisit and reverse the decision of *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 125 L.Ed.2d 74, 113 S.Ct. 2510 (1993), to find in favor of the City.

The first reason this argument should be rejected is that the lower Court decision does not announce new law. As noted above, the unconstitutional conduct complained of denied Plaintiff's promotions from 1987 on which was after the Sixth Circuit overruled the lesser scrutiny standard used in *Bratton.* It was also after this Court announced in *Wygant* that racial quotas would be subjected to strict scrutiny. Therefore, there can be no claim of good faith reliance by the City that a less intense review than a strict scrutiny standard applied to the racial quota after 1986. Moreover, the City's claim of good

faith reliance on the right to implement a promotion quota is also suspect because the Federal Court in *Alfaro* found years before the implementation of this quota that a quota was not necessary for remedial action in promotion.

The City's argument should also fail because even if the decision below is new law, the doctrine holding that new law should not be applied retroactively is not applied to deprive a successful litigant of the fruits of the challenge. Thus, even where the Court finds that a change in law should not apply retroactively, that change still applies to the successful parties. *Simpson v. Union Oil Co.*, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969).[12]

The decision in the instant case does not present an occasion for this Court to revisit *Harper v. Virginia Department of Taxation, supra.* A decision in this case would still be applied retroactively to Plaintiff's promotions even before the ruling in *Harper* was enunciated. *Chevron Oil Company v. Huson,* 404 U.S. 97, 30 L.Ed.2d 296, 92 S.Ct. 349 (1971) when applied to the decision in this case compels retroactive application of the Court's decision to vindicate the promotion denials Plaintiffs have suffered. Therefore, the retroactivity rule found in *Harper* would not be affected by the decision in this case.

Finally, the City's claim that it would be inequitable to hold it accountable for the deliberate and repeated violation of the constitutional rights of the officers under the undisputed facts in this case is so extreme as to be incredible. The fact that the City has the audacity to claim that

---

[12]The case of *DPOA v. Young,* 989 F.2d 225 (6th Cir. 1993) did not enunciate a doctrine on retroactivity which changed this principle. On the contrary, the Sixth Circuit found that the decision should be applied and remanded the case to the lower court to determine what relief the officers should receive. *DPOA v. Young, supra,* 989 F.2d at 228.

it is unfair for it to be held accountable for the harm caused by a quota derived from racial politics which has severely impacted on the careers and lives of its police officers even when it was told by lower federal courts that such a quota was not necessary before it was implemented is beyond belief. The City claims that it has not used the quota since 1993. If that is true the statute of limitations has run on any other potential claims and therefore the suggestion by the City of an "enormous potential exposure to class action lawsuits" creating a manifest injustice has no substance.

CONCLUSION

This court should deny the City's Petition for Certiorari, deny the City's request to vacate the decision of the Sixth Circuit, and deny the City's request to remand for a reopening of the record.

Respectfully submitted,

GREGORY T. GIBBS (P 26440)
MICHAEL J. KELLY (P 41358
One Citizens Banking Center
328 South Saginaw Street
Suite 9001
Flint, Michigan 48502-1904
(810) 239-9470
Attorneys for Respondents.

March 24, 1997

APPENDIX A

[Filed OCT 29, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

CIVIL ACTION NO: 90-CV-40148-FL

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McCLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiff,

v.

THE CITY OF FLINT, a municipal corporation,

Defendant.

CIVIL ACTION NO: 84-CV-8066-FL

MARADEAN BARCUME, CHARI BORTNER, BARBARA BURNETT, ANN DRENNAN, LEE ANN GASPER, CONNIE MARTIN, MAUREEN McINTYRE, DAWN SKIDMORE, JACQUELINE SOVA, KRISTINE SURDU, ANN TALT-HARRIS, DEBRA WILLIAMS and MICHELLE MARSHKE,

Plaintiffs,

v.

THE CITY OF FLINT, a municipal corporation, and the FLINT POLICE OFFIERS ASSOCIATION, a labor union,

Defendants.

STATUS CONFERENCE ORDER

In *Middleton v. City of Flint*, a Status Conference was held on October 15, 1991. At that conference the following matters were discussed and decided:

1. Defendants will be allowed to complete their deposition of Dr. Frank, and may depose the *Middleton* plaintiffs' economic expert.
2. For administrative purposes only, this case will be consolidated with *Barcume v. City of Flint*, no. 84-8066. At the Final Pre-Trial Conference the Court will determine whether the case should be consolidated regarding the substantive issue of the constitutionality of the Affirmative Action Plan.
3. Defendants will propose to the plaintiffs in both *Middleton* and in *Barcume* a common factual basis upon which the constitutional issue will be determined. By October 22, 1991, defendants will notify the Court whether a stipulation on this matter can be achieved, and if so what that stipulation entails. (At the conference, the parties present agreed that the Human Relation Commission Hearings and resulting report probably form a common factual background upon which all parties will rely to make their respective arguments.)
4. The parties, in *Middleton* and in *Barcume*, must also jointly determine the questions that will be asked of each party's expert. The parties will notify the Court in writing of the questions to be asked by November 6, 1991.

5. The defendants have filed a Motion for Summary Judgment in both *Middleton* and *Barcume*. The plaintiffs in both cases will respond to defendants' Motions for Summary Judgment by November 4, 1991.

6. A hearing on defendants' Motions for Summary Judgment in both cases will be held on November 18, 1991 at 1:30 p.m. This hearing is scheduled for the entire afternoon.

7. The Court will decide all other pending motions (except the Motion for Consolidation) in *Barcume* and *Middleton* by November 18, 1991.

8. Following the November 18th hearing, for both *Middleton* and *Barcume*, a joint Status Conference will be held on the record.

SO ORDERED.

Date: 10/28/91

/s/ Stewart A. Newblatt 10/28/91
STEWART A. NEWBLATT
United States District Judge

[Filed OCT 29 1991]

CERTIFICATION OF SERVICE

CASE NO: 90-40148
84-8066

UNITED STATES OF AMERICA)
) SS
EASTERN DISTRICT OF MICHIGAN)

I, the undersigned, hereby certify that I have on the 29th day of October, 1991, mailed a copy of the Status Conference Order in the foregoing cause, pursuant to Rule 77(d), Fed.R.Civ.P., to the following persons at the addresses given:

Michael J. Kelly
Edwin W. Jakeway
G-8161 S. Saginaw
Grand Blanc, MI 48439

Gregory T. Gibbs, Esq.
2483 S. Linden Road
Flint, MI 48532

Terrence J. Miglio
Donna R. Nuyen
440 East Congress
5th Floor
Detroit, MI 48226

Bernard Feldman
2301 W. Big Beaver
Suite 925
Troy, MI 48084

Susan Winshall
21700 Northwestern Hwy.
Suite 900
Southfield, MI 48075

/s/ Colette J. Lehoux,
Secretary to Stewart A. Newblatt
United States District Judge

APPENDIX B

KELLER, THOMA, SCHWARZE, SCHWARZE,
DuBAY & KATZ, P.C.

COUNSELORS AT LAW

440 EAST CONGRESS
5TH FLOOR
DETROIT, MICHIGAN 48226

(313) 965-7610
FAX (313) 965-4480

RICHARD J. THOMA
CHARLES E. KELLER
FREDERICK B. SCHWARZE
THOMAS H. SCHWARZE
DENNIS B. DuBAY
JAMES R. MILLER
STEWART J. KATZ
ANTHONY J. HECKEMEYER
THOMAS L. FLEURY
TERRENCE J. MIGLIO
GARY P. KING
DONNA R. NUYEN
ROBERT A. LUSK
LINDA M. FOSTER
ANDREA L. BOWMAN
BRUCE M. BAGDADY
CARL F. SCHWARZE
GEORGE P. BUTLER, III
CHRISTOPHER H. MURRAY
BRIAN A. KREUCHER
BONNIE L. FOSTER

MALCOLM L. DENISE
OF COUNSEL

LEONARD A. KELLER
1906-1970

BLOOMFIELD HILLS OFFICE
SUITE 122
100 WEST LONG LAKE ROAD
BLOOMFIELD HILLS, MICHIGAN 48404
(313) 647-3114
FAX (313) 647-3642

October 28, 1991

The Honorable Stewart Newblatt
140 Federal Building
600 Church St.
Flint, Michigan 48502-1279

Re: *Middleton, et al. v. City of Flint, et al.*
Case No.: 90-CV40148FL

Dear Judge Newblatt:

In accordance with your direction at the October 15, 1991, status conference in the case of *Middleton, et al. v. City of Flint, et al.*, I contacted Ms. Winshall, attorney for the Plaintiffs in *Barcume v. City of Flint* to prepare a Stipulation of the proofs the parties would present in *Barcume* on the issue of the constitutionality of the affirmative action plan. I spoke with Ms. Winshall on October 21, 1991. As I understood her position, she believes that the facts and documents to support her clients' position on the constitutional issues are set forth in the Motion for Summary Judgment which she filed in December, 1985 and her response to Defendant City of Flint's Motion for Summary Judgment also filed in December, 1985. Ms. Winshall did not believe that preparing a written Stipulation of Facts would result in a document radically different from the cross Motions for Summary Judgment. Accordingly, she refused to enter into a Stipulation.

The purpose of this letter therefore, is to apprise you of the events upon which Defendant, City of Flint, will rely to establish the constitutionality of the affirmative action plan as originally constituted in 1984, and to list the documents upon which the City of Flint would rely to establish the constitutionality. Thus, while I do not have a Stipulation between Ms. Winshall and myself, I have enclosed lists of the events and documents which the City believes are pertinent to the constitutional issue. If you have any questions regarding these lists, please do not hesitate to contact me.

Very truly yours,

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

/s/ Donna R. Nuyen
Donna R. Nuyen

DRN/dgp: 503
Encl.
cc: Michael Kelly
Gregory Gibbs
Susan Winshall

DEFENDANT CITY OF FLINT'S LIST OF EVENTS RELATIVE TO THE CONSTITUTIONALITY OF THE POLICE DEPARTMENT'S AFFIRMATIVE ACTION PLAN ADOPTED IN 1984

1. Council's Special Legislative Committee meeting of August 26, 1981.
2. Special Flint City Council meeting of April 4, 1983.
3. Special Flint City Council Meeting of April 7, 1983.
4. Special Flint City Council Meeting of April 8, 1983.
5. Special Flint City Council Meeting of April 18, 1983.
6. Special Flint City Council Meeting of January 30, 1984.
7. Special Flint City Council Meeting of February 1, 1984.
8. Negotiations between the City of Flint and the Flint Police Officers Association for the July 1, 1983 – June 30, 1984 collective bargaining agreement.
9. Negotiations between the City of Flint and the FPOA for the 1984 Addendum to the collective bargaining agreement.
10. Affirmative action committee meetings in 1983.
11. POAM ratification vote in January, 1984.
12. Human Relations Committee hearing on April 4, April 10, and April 11, 1984.
13. Negotiations between the City of Flint and the FPOA for the July 1, 1985 – June 30, 1988 collective bargaining agreement.

14. Negotiations between the City of Flint and the FPOA for the July 1, 1988 – June 30, 1989 collective bargaining agreement.
15. Negotiations between the City of Flint and the FPOA for the July 1, 1989 – June 30, 1992 collective bargaining agreement.
16. Sergeants promotional exam in 1983.
17. Sergeants promotional exam in 1985.
18. Sergeants promotional exam in 1987.
19. Sergeants promotional exam in 1989.
20. 1980 Census.
21. 1990 Census (when available).

DOCUMENTS UPON WHICH THE CITY OF FLINT MAY RELY

1. 1971 City Affirmative Action Plan.
2. 1985 City Affirmative Action Plan.
3. 1975 SAAP Affirmative Action Agreement for promotions to sargeant.
4. 1972 collective bargaining agreement between the City of Flint and the FPPA.
5. 1975 Agreement between Flint and Teamsters Local 214.
6. 1977 Agreement between Flint and Teamsters Local 214.
7. 1980 Agreement between Flint and Teamsters Local 129.
8. 1983-1984 collective bargaining agreement between Flint and the FPOA.

9. 1984 Addendum to collective bargaining agreement, July 1, 1983 to June 30, 1985.
10. 1985-1988 collective bargaining agreement between the City of Flint and the FPOA.
11. 1988-1989 collective bargaining agreement between the City of Flint and the FPOA.
12. 1989-1992 collective bargaining agreement between the City of Flint and the FPOA.
13. Posting, 1983 sergeant's promotional exam.
14. Eligibility list, 1983 sergeant's promotional exam.
15. Posting, 1985 sergeant's promotional exam.
16. Eligibility list, 1985 sergeant's promotional exam.
17. Posting, 1987 sergeant's promotional exam.
18. Eligibility list, 1987 sergeant's promotional exam.
19. Posting, 1989 sergeant's promotional examination.
20. Eligibility list, 1989 sergeant's promotional exam.
21. Flint City Council Meeting Minutes, August 26, 1981.
22. Flint City Council Meeting Minutes, July 19, 1983.
23. Flint City Council Meeting Minutes, April 8, 1983.
24. Flint City Council Meeting Minutes, April 18, 1983.
25. Flint City Council Meeting Minutes, January 30, 1984.
26. Flint City Council Meeting Minutes, February 1, 1984.
27. Correspondence to union members, January 20, 1984.
28. HRC hearing transcript, August 4, 1984.

29. HRC hearing transcript, April 10, 1984.
30. HRC hearing transcript, April 11, 1984.
31. Need For Affirmative Action In The City of Flint's Police and Fire Department: A Report of Public Hearings.
32. Minority hiring and promotion in the Flint Police Department: A Labor Market Analysis by Mark Bendick, PhD, 1984.
33. March 39, 1984 letter from James Sharp to the Human Relations Commission.
34. Presentation of Miles White, Chief of Police, City of Flint, Michigan.
35. Deposition transcripts of Plaintiffs, Ananich, Bugbee, Dickinson, Dicks, Hawkins, McManaman, Sanchez and Sharp.
36. Case file: *Waldron v City of Flint*
37. Case file: *Holliman v Price*
38. Case file: *Flint Police Patrolman's Association v City of Flint*
39. Case file: *Alfaro v Suber*
40. Case file: *Holliman v Price*
41. Case file: *Pizala v City of Flint*
42. Case file: *Cheatham v City of Flint*
43. Case file: *Graham v City of Flint*
44. Case file: *Miller v City of Flint*
45. Case file: *MDCR ex rel Chari Bradley v City of Flint*
46. Flint City Code
47. City of Flint EEO-4 reports for the years 1980-1991, inclusive.
48. Population/Workforce Statistical and Census Data.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

No. 90-CV 40148-FL
STEWART A. NEWBLATT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McCLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

-vs-

THE CITY OF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of MILES L. WHITE, was taken before me, Lisa F. Wolanin, CSR-3259, Notary Public, at 2483 South Linden Road, Flint, Michigan, on Wednesday, August 14, 1991, commencing at or about 1:25 P.M.

APPEARANCES:

GREGORY T. GIBBS, ESQUIRE, (P-26440)
2483 S. Linden Road
Flint, Michigan 48532

Appearing on behalf of the Plaintiffs.

MICHAEL J. KELLY, ESQUIRE, (P-41358)
G-8161 S. Saginaw Street
Grand Blanc, Michigan 48439

Appearing on behalf of the Plaintiffs.

DONNA R. NUYEN, ESQUIRE, (P-34636)
440 E. Congress, 5th Floor
Detroit, Michigan 48226

Appearing on behalf of the Defendants.

* * *

[9] first of the year, 1984, he had people from the Human Relations Commission and consulting people from a consulting firm there and outlined what his course of action – what he felt his course of action – what he wanted it to be.

Q. Do you recall what he said he wanted, he being the mayor, we're talking about, right?

A. Yes.

Q. Do you recall what the mayor said he wanted his course of action to be?

A. He didn't go beyond the fact that they were going to have a series of hearings, and he wanted a historical presentation regarding hiring and promotional practices with the emphasis on any disparate effects on minorities.

Q. Did he tell you he wanted to find out if there were disparate effects on minorities?

A. No, I don't – no, I don't think so. I don't recall that.

Q. Did Mayor Sharp proceed, at least in your mind, with the attitude that there had been disparate hiring in the past, was that his opinion at the time?

A. I don't recall any conversations with him, but I

believe he was on record publically as part of his campaign, you know, with speeches to that effect.

Q. So you had this meeting and this kind of directive was

* * *

[17] minutes ago, basically it was based on the entry percentage of minority officers going back, I believe at that time, about 30 years. There were some years we did better than others, but in general terms.

Q. Were you aware – you had been with the Police Department from 1965 to 1984, were you aware of any intentional discriminatory practices that were used against black applicants while you were at the Police Department?

A. No.

Q. Before becoming the Chief of Police, were you in a supervisory position?

A. Yes, I came up through the ranks.

Q. So when you came up, you started out as a patrol officer, is that correct?

A. Yes.

Q. Then you went to Sergeant?

A. Yes.

Q. And from Sergeant, you went to Lieutenant?

A. Yes.

Q. From Lieutenant to –

A. Deputy Chief.

Q. And from Deputy Chief to Chief, is that correct?

A. Yes.

Q. Now, while you were in the supervisory positions, were you aware of any intentional discriminatory practices

* * *

[27] successfully to exclude minorities. Can you tell me what you meant by that?

A. Well, the written exams appeared to be stumbling blocks over which they couldn't – you know, they couldn't succeed, and up until that time, the only criteria for promotion was a good service record or acceptable service record, minimum number of years to make you eligible to write the exam of service, and where you placed in percentages on the exam, and up until that time, there hadn't been a minority applicant for promotion ever placed high enough to receive a promotion, not that none had ever passed that I recall, but that –

Q. Okay, let me ask you this. From 1965 until 1984, during that period of time, was there ever a time when sergeants were hired from outside the police department?

A. No.

Q. So it was always during this period of time that the pool of applicants for the sergeant position would be from the police officers, is that correct?

A. Yes.

Q. You indicate as a result of litigation, five minority officers were promoted on September 25, 1974. Do you know which litigation that refers to? I understand it has been a long time. I'm just curious if you can tell me.

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

NO: 90-CV-40148-FL
JUDGE NEWBLATT

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR; BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES McLELLAN, MARK CAMPBELL; and THOMAS HILGENDORF,

Plaintiffs,

vs.

THE CITY OF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of *THOMAS RAYMOND BUGBEE*, taken before me, Daniel E. Ripka, CSR-2367, Notary Public, on Friday, August 16, 1991, at the offices of Ripka, Boroski & Associates, 717 South Grand Traverse, Flint, Michigan commencing at or about 9:43 A.M.

APPEARANCES:

GREGORY T. GIBBS, ESQ. (P26440)
2483 South Linden Road
Flint, Michigan 48532

Appearing on Behalf of Plaintiffs.

* * *

[10] recognized that there was a need to ensure that standard for whether or not you had people of different races applying.

Q. Now, before that position was created – we're calling it that position. I don't even know if we know the name of it, that this Carole person was in. When you were involved in either the supervision or construction of examinations or in the actual construction of examinations did you ever personally design an examination with the intent to exclude black persons –

A. Definitely not, no.

Q. – from passing the exam?

A. No.

Q. Okay. Did you ever observe anyone else in the department create an examination – When I say the department, I mean –

A. Yes.

Q. – where you were working. Create an examination with the intent to exclude black persons from passing it?

A. No.

Q. Okay. How long were you in the position of classification supervisor?

A. Approximately four to four and a half years.

Q. Okay. Classification examination supervisor, would that be it?

[11] A. Correct.

Q. Okay. In that position would you supervise this Carole, whose last name we can't remember?

A. Yes.

Q. And, in fact, she did validate examinations, or at least engage in a validation process for examinations in the police department during that time, didn't she?

A. Yes.

Q. While you supervised this individual by the name of Carole did you ever observe her engage in a process of intentionally designing or designing an examination with the intent to exclude black applicants from passing?

A. No.

I think I just remembered her name, Carole Wilcox.

Q. Okay.

A. That was C-A-R-O-L-E.

Q. After that four-and-a-half-year period were you promoted to a higher position?

A. At that point we had a change in the form of government from a city council, city manager appointed by the city council form of government to a strong mayor form of government with the election being conducted in November of 1986? No, '76? And we had our first strong mayor elected. And at that point shortly thereafter there was [12] an interim personnel director appointed named Aubrey Lynch.

Q. Aubrey, A-U-B-R-E-Y?

A. I believe so. He was a black male Ph.D. who had worked at General Motors Institute. He was there but for a short time, and then I was appointed as the personnel director.

Q. Okay. Did you act as the right-hand employee to Aubrey Lynch?

A. Yes.

Q. Were you appointed sometime in '76, or was it in '77?

A. I was appointed in '76. I think the election must have been in '75. The first strong mayor might have been '75. I was appointed in '76.

And I think during that period they changed my title to deputy personnel director while Aubrey was

there. And I was told when he was appointed on the interim basis that I would be the next personnel director.

Q. While Aubrey Lynch was there did you observe Mr. – Was it a he or a she?

A. He.

Q. – Mr. Lynch engage in any practices with respect to the construction of tests or the use of selection criteria for employment that were designed to intentionally [13] discriminate against black applicants?

A. No.

Q. And you were appointed personnel director sometime in 1976?

A. Yes.

Q. Okay. And you would have been appointed by whom?

A. I was appointed by Mayor Rutherford, James Rutherford.

Q. And you served in that capacity until 1986?

A. I served until January 1988.

Q. I'm sorry. January of '88.

Were you reappointed by different mayors?

A. I served two terms under Mayor Rutherford, and I served one term under Mayor James E. Sharp, and I was not reappointed with the current mayor, Matthew Collier.

I stayed on from when he took office in November until January simply until a replacement was found for me.

Q. And do you know the name of the individual that replaced you?

A. I can't think of it. He's now at Mott Community College, but . . .

Q. Okay. When you were appointed as personnel director what were your duties?

A. Primarily oberseeing the entire personnel system.

The first principal duty I had was to [14] develop personnel rules and regulations, because under the strong mayor form of government they disbanded – or reorganized the system. We had what is really called a civil service system prior to the strong mayor, and there was a three-member commission, Civil Service Commission that oversaw the civil service operation. And they would also hear appeals from applicants and employees. And employees it could be a range from appealing a standing on an examination, whether it could be a classification appeal, disciplinary matter. After the strong mayor form of government they split those and created the personnel department. The Civil Service Commission then became a seven-body commission adjudicatory role in hearing matters.

The personnel department – Then I had to create personnel rules and regulations, negotiate those with the six bargaining units, conduct public hearings regarding those personnel rules and regulations, but essentially oversaw the complete personnel operation, all aspects of that system, which included the – we had an employee health clinic, safety office, and at the early stages the affirmative action officer reported to the personnel director. And I had upwards of thirty some employees at one time when we had the Comprehensive Employment Training Act housed in that department, and [15] so forth.

Q. Okay. During that period of time when you served as personnel director was one of the functions of the personnel department to review, and develop, and create selection criteria for positions in the police department?

A. Yes.

Q. And that would not only be entry level positions, such as police officer, but also higher supervisory positions such as sergeants?

A. Yes.

Q. Okay. During that period of time that you served as personnel director were you aware of any practice in your department that was designed to exclude blacks from either entering into entry level positions of police officer or being promoted to the position of sergeant?

A. No.

Q. And did you advocate or did anybody in your department advocate such selection procedures?

A. No.

Q. Okay. This particular suit involves a challenge to an affirmative action program that was adopted by the City of Flint in 1984 relating to a program that required for each person promoted into the sergeant position at the police department there should be one minority person

* * *

[20] itself adversely affect candidates.

Q. And the concentration at least as to the police department with respect to selection procedures would be at every level?

A. That's correct.

Q. Entry level, it would be police officer there; is that right?

A. Yes.

Q. And then the second level, I guess, would be sergeant?

A. Yes.

Q. Okay. And then go upwards from there?

A. I think lieutenant, then captain. But we were as vigorous in doing – ensuring that our validation was acceptable at any level, whether or not we had candidates of a minority group.

Q. And that was before even this 1984 Human Relations Commissions hearing?

A. Oh, very definitely.

Q. Okay. I'm going to show you this document. It's title is Need For Affirmative Action in the City of Flint's Police and Fire Departments. It's sixteen pages in length, and it's been marked as Exhibit 1 to this particular deposition.

And what I'd like to do is take some time to review it right now. I know you've been gone from [21] the city for a while, but I'll be asking you some questions about it.

A. Okay. Could I preface whatever your questions are that I was not involved with any of the Human Relation Commission hearings, I did not attend any of the hearings, and I'm only a party to it that I was employed by the city at that time. But I'm not conversant with the specifics of the hearing, and only in general terms, you know, so . . .

Q. Okay. That's one of the questions I was going to start out with. I didn't see you as someone listed who testified from their report at least. And that's correct then, you did not testify?

A. Yes, I did not testify.

Q. Okay. Why don't you take some time anyway to just skim it, if you want, then I'll ask you some questions.

(A discussion was had off the record.)

Q. (BY MR. GIBBS): Okay. Mr. Bugbee, you already indicated that you were not involved in those hearings?

A. That's correct.

Q. So as I understand it you gave no testimony at the hearings; is that correct?

A. That's correct.

Q. You did not attend the hearings?

[22] A. I did not attend.

Q. Okay. And you were not a member of the panel

known as the Human Relations Commission?

A. That's correct.

Q. Okay. Let me ask you this, and you may or may not recall, I don't know. But wasn't the one-to-one affirmative action policy in effect before these hearings took place in April of 1984?

A. If it was it was early. Because I think we met as a panel in '83. And it could have preceded this, and I believe it did, but it – I believe we had the one-and-one by the time we had the hearings.

MS. NUYEN: Can you clarify for me what you mean by in effect? I'm not sure I understand that.

MR. GIBBS: Okay. Well, I'm going to go into it.

Q. (BY MR. GIBBS): When I say in effect I mean was it being used before the hearings in 1984?

A. I believe it was before the hearings. But it may not have been. I know it was in '83 that we met as a committee from the police department, and part of our recommendations for the negotiating team was that one-to-one. Now, whether that triggered before the commission hearings was in effect before, you know, I can't answer with any degree of certainty. I'm sure the

* * *

[25] the position of the city administration?

A. It was for a one-to-one.

Q. In terms of negotiations and the city's position, was it your responsibility to basically advocate the city's position?

A. That's correct.

Q. As personnel director?

A. That's correct.

Q. Okay. So you would know what they want?

A. Yes, very definitely.

Q. Okay. And to the best of your recollection this was advocated before these hearings?

A. Yes.

Q. Okay. And this being that one-to-one ratio; is that correct?

A. Yes.

Q. Okay. Now, you indicated you weren't involved in these. Did you know they were going on?

A. Yes. It was front page stuff, I guess, at the time.

Q. Did anyone from your department go to these hearings? They have a list on the front page here of –

A. I don't believe so. At that point the – I'm sure Louis Hawkins would have been a principal party, who was the – He was the affirmative action officer for the city. And I believe by then he was no longer a member of the

* * *

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION – FLINT

Case No. 90-CV40148-FL
JUDGE NEWBLATT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McCLELLAN, MARK CAMPBELL and THOMAS HILGENDORF,

Plaintiffs,

vs.

THE CITYOF FLINT, a municipal corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

The Deposition of JAMES A. SHARP, JR., taken before Zo Turner, CSR-2496 and Notary Public, on Monday, September 30, 1991, at the law office of Gregory T. Gibbs, 2483 South Linden Road, Flint, Michigan, commencing at or about 10:25 in the forenoon.

APPEARANCES:

GREGORY T. GIBBS, ESQUIRE (P-26440)
2483 South Linden Road
Flint, Michigan 48532

Appearing on Behalf of the Plaintiffs.

* * *

[11] in city employment, didn't you?

A. Yes.

Q. As part of a platform that you –

A. Yes.

Q. And as part of that, the need for affirmative action, you advocated the need for the use of affirmative action in the police department. Isn't that correct?

A. Yes.

Q. Now, what I'd like to try to do is confine the next series of questions to after your election in November of 1983, but before the hearings conducted by the Human Relations Commission in April of 1984.

And ask you that after you took office in November of 1983, up until April of 1984, what steps did you take as mayor of the City of Flint to implement an affirmative action program for the City of Flint Police Department?

A. Was to participate in discussions that reviewed the existing Affirmative Action Committee – Committee's activities at appropriate times and to provide input, guidance into those – those committee meetings.

Q. So what you're saying is at the time you took office there was an existing committee called an Affirmative Action Committee?

A. Yes.

* * *

[14] you recall?

A. I don't recall.

Q. Would it have been Richard Davidson?

A. I don't recall.

Q. Was Richard Davidson fire chief at some point during your administration?

A. I don't recall. I don't know that name.

Q. Did you appoint Miles White as the chief of police?

A. Yes.

Q. Did your administration have a position known as Deputy Administrator for Public Safety?

A. Yes.

Q. Did Richard Dicks hold that position?

A. Yes.

Q. And did you appoint Mr. Dicks in that position?

A. Yes.

Q. Do you remember who your affirmative action officer was in 1983?

A. Louis Hawkins.

Q. And the city attorney, do you recall who the city attorney was originally when you came into office?

A. The city attorney that I appointed was Olof Karlstrom.

Q. Was there an interim city attorney before Mr. Karlstrom?

A. I don't remember.

Q. And do you recall who the city administrator was?

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 90-CV-40148-FL
HON: STEWART A. NEWBLATT

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

CITY OF FLINT, a Municipal Corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

Michael J. Kelly (P41358)
Attorney for Plaintiffs

Gregory Gibbs (P2644)
Attorney for Plaintiffs

Terrence J. Miglio (P30541)
Donna R. Nuyen (P34636)
Attorneys for Defendant City of Flint
440 E. Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS

NOW COMES Defendant, The City of Flint, by and through its attorneys, KELLER, THOMA, SCHWARZE, DuBAY & KATZ, P.C., and in response to Plaintiffs' First Set of Requests for Admissions, state as follows:

REQUEST FOR ADMISSION NO. 1

ADMIT that the Flint Human Relations Commission ("HRC") announced its intention to hold public meetings, held public hearings, and issued its official report regarding an affirmative action plan subsequent to the date the FPOA and the City of Flint negotiated the one for one promotion addendum to the 1983-84 collective bargaining agreement.

RESPONSE TO REQUEST FOR ADMISSION NO. 1

Defendant admits that the Flint Human Relations Commission announced its intention to hold public meetings, held public hearings, and issued its official report regarding the need for affirmative action in the City of Flint's Police and Fire Departments subsequent to the date the FPOA and the City of Flint negotiated the addendum to the July 1, 1983 to June 30, 1984 collective bargaining agreement.

REQUEST FOR ADMISSION NO. 2

ADMIT that the City of Flint did not obtain prior approval from the Michigan Civil Rights Commission before implementing the one-for-one promotional affirmative action plan.

RESPONSE TO REQUEST FOR ADMISSION NO. 2

Admitted.

REQUEST FOR ADMISSION NO. 17

ADMIT that in the absence of an affirmative action plan Plaintiff Bruce Sepanak would have been number 6 on the 1989 promotional eligibility list because officers Thomas Korabik, Brian Sepanak, Maynard Newman, Barry Saunders, Lloyd Whetstone, Gregory Doerr, James McClellan and Ronald Nelson would have been promoted on 1983, 1985 and 1987 promotional eligibility lists.

RESPONSE TO REQUEST FOR ADMISSION NO. 17

Denied.

Respectfully submitted,

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By /s/ Terrence J. Miglio

Terrence J. Miglio (P30541)
Donna R. Nuyen (P34636)
Attorneys for Defendant
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

Dated: December 5, 1990

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. Stewart A. Newblatt
Case No. 90-CV-40148-FL

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McLELLAN, MARK CAMPBELL, and THOMAS HILGENDORF,

Plaintiffs,

v

CITY OF FLINT,

Defendant.

Glen N. Lenhoff (P32610)
Attorney for Plaintiffs

Michael J. Kelly (P-41358)
Co-Counsel for Plaintiffs

Terrence J. Miglio (P30541)
Donna R. Nuyen (P-34636)
Attorneys for Defendant
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

DEFENDANT'S AFFIRMATIVE DEFENSES

NOW COMES the Defendant, CITY OF FLINT (hereinafter referred to as "Defendant"), by and through its attorneys, KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C., and for its Affirmative Defenses states as follows:

1. The Complaint fails to state a claim upon which relief may be granted.

2. Plaintiffs are barred from maintaining the instant action by reason of the doctrines of laches, waiver, estoppel and/or unclean hands.

3. Plaintiffs have failed to diligently mitigate their damages and, therefore, are barred from receiving all or part of the relief requested in the Complaint.

4. Plaintiffs' Complaint is barred by the applicable statute of limitations.

5. The actions or communications complained of in the Complaint are absolutely and/or qualifiedly privileged or justified pursuant to the Constitutions, statutes and common law of the State of Michigan and the United States.

6. Plaintiffs have failed to join an indispensable party to this action.

7. Some or all of the Plaintiffs lack standing to raise the claims allegedly asserted in their Complaint.

8. Some or all of the Plaintiffs have failed to exhaust their administrative and/or contractual remedies.

9. The Affirmative Action Plan adopted by the Police Department of the City of Flint was approved by the Michigan Civil Rights Commission on January 28, 1986.

10. Defendant reserves the right to assert further Affirmative Defenses upon discovery of facts not presently known.

WHEREFORE, Defendant prays that this Honorable Court dismiss Plaintiffs' Complaint in its entirety, with prejudice, and award Defendant its costs and attorney fees incurred in having to defend against same.

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By /s/ Terrence J. Miglio
Terrence J. Miglio (P30541)
Donna R. Nuyen (P34636)
Attorneys for Defendant
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

Dated: [Illegible], 1990.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Hon. Stewart A. Newblatt
Case No. 90-CV-40148-FL

CHARLES MIDDLETON, W. OSMUND KELLY, III, BRIAN SEPANAK, BRUCE SEPANAK, STEPHEN HILL, GREGORY DOERR, BARRY SAUNDERS, ROBERT LOREY, MAYNARD NEWMAN, JAMES McLELLAN and THOMAS HILGENDORF,

Plaintiffs,

v

CITY OF FLINT, a Municipal Corporation, and THE FLINT POLICE OFFICERS ASSOCIATION,

Defendants.

DEFENDANT CITY OF FLINT'S
MOTION FOR SUMMARY JUDGMENT

NOW COMES the Defendant, CITY OF FLINT (hereinafter the "City"), by and through its attorneys, KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C., pursuant to Fed. R. Civ. P. 56(c), and in support of its Motion for Summary Judgment, states:

1. On May 11, 1990, Plaintiffs filed a three count Complaint alleging that the City's promotional practices for the promotion of patrol officers to the rank of sergeant violated 42 USC §1981, 42 USC §1983, and

Michigan's Elliot-Larsen Civil Rights Act, MCLA §37.-2101, *et seq.*; MSA §3.548 (101), *et seq.*

2. Based on this Court's statements at the hearing held on the City's October 9, 1991, Motion to Dismiss and for Summary Judgment, Plaintiffs' Elliott-Larsen claims will be dismissed, and their federal claims will remain, pending the filing of the instant Motion for Summary Judgment.

3. In November, 1983, the City and Defendant, Flint Police Officers Association ("FPOA") commenced negotiations on the issue, *inter alia,* of affirmative action in the promotion of patrol officers to the rank of Sergeant. These negotiations resulted in an Addendum to the collective bargaining agreement (Exhibit 1), which was ratified by the FPOA membership on January 27, 1984, and by the Flint City Council on February 1, 1984.

4. In April of 1984, the Flint Human Relations Commission ("HRC") held extensive hearings on the need for affirmative action in the Flint Police Department, and concluded that the City had discriminated against minorities in hiring and promotions which resulted in a conspicuous under-representation of minorities in all ranks of the Department.

5. Based on the findings and conclusions of the HRC, the City implemented a 1:1 promotion ratio from patrol officer to sergeant.

6. A municipality's voluntary affirmative action plan does not violate the Fourteenth Amendment of the United States Constitution if the municipality has a compelling governmental interest to implement the plan and the plan is narrowly tailored to serve that interest.

7. There is no genuine issue as to any material fact that the City had a compelling governmental interest just-

ifying implementation of the Affirmative Action Plan ("AAP" or "the Plan") since the HRC found that the City had discriminated against minorities in hiring and promotions within the Police Department and had failed to properly comply with the remedial orders of this Court regarding race discrimination since the 1970's.

8. There is no genuine issue as to any material fact that the City's AAP is narrowly tailored to serve the City's compelling governmental interest since it is flexible, limited in duration, is based on the relevant labor market and is not overly intrusive on the rights of third persons.

9. Plaintiffs' Complaint must be dismissed in its entirety because the City had a compelling governmental interest to implement affirmative action in the Police Department, the Plan is narrowly tailored to serve that interest, and the Plan, therefore, conforms to the requirements of the Equal Protection Clause of the Fourteenth Amendment.

10. This Motion is based upon the accompanying Brief in Support of Motion for Summary Judgment and all pleadings filed in this case to date.

WHEREFORE, Defendant CITY OF FLINT respectfully requests that this Honorable Court grant its Motion and enter an Order dismissing Plaintiffs' Complaint in its entirety, with prejudice, and award Defendant its costs and attorney fees incurred herein.

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By /s/ Donna R. Nuyen
Donna R. Nuyen (P-34636)

Christopher M. Murray (P43849)
Attorneys for Defendant City
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

Dated: May 18, 1992.
WP: CMM323

Supreme Court, U.S.
FILED
APR 16 1997
OFFICE OF THE CLERK

No. 96-1211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

THE CITY OF FLINT, MICHIGAN,

Petitioner,

v.

CHARLES MIDDLETON; W. OSMUND KELLY, III; BRIAN SEPANAK; BRUCE SEPANAK; STEPHEN HILL; GREGORY DOERR, BARRY SAUNDERS; ROBERT LOREY; MAYNARD NEWMAN; JAMES McCLELLAN; and THOMAS HILGENDORF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

TERRENCE J. MIGLIO
(Counsel of Record)
PATRICIA B. KENNY
KARIN M. YOUNG
KELLER, THOMA, SCHWARZE, SCHWARZE, DuBAY & KATZ, P.C.
440 E. Congress, 5th Floor
Detroit, MI 48226
Attorneys for Petitioner.

DIANE M. SOUBLY
VERCRUYSSE METZ & MURRAY
31780 Telegraph Road
Suite 200
Bingham Farms, MI 48025
Co-Counsel for Petitioner

WILLIAM H. CRAWFORD, II
Chief Legal Officer
City of Flint
1101 South Saginaw
Flint, MI 48502
Co-Counsel for Petitioner

Washington, D.C. • THIEL PRESS • (202) 328-3286

21 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

FACTUAL BACKGROUND. 1

ARGUMENT 2

I. THE SIXTH CIRCUIT'S APPLICATION OF THE STRICT SCRUTINY STANDARD WAS FATAL IN FACT 2

II. THE SIXTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY TO PROVE THAT ITS AFFIRMATIVE ACTION PLAN WAS CONSTITUTIONAL 3

III. THE SIXTH CIRCUIT COMPLETELY DEPARTED FROM SUPREME COURT PRECEDENT IN REJECTING THE CITY'S STATISTICAL EVIDENCE 4

IV. THE SIXTH CIRCUIT FAILED TO CONFINE ITS REVIEW TO WHETHER RESPONDENTS HAD RAISED A GENUINE ISSUE OF MATERIAL FACT WHICH REQUIRED THE CITY'S MOTION BE DENIED 6

V. THE SIXTH CIRCUIT'S UNJUST RETROACTIVE APPLICATION OF IMPROPERLY HEIGHTENED STRICT SCRUTINY SHOULD BE REVERSED AND/OR THE DECISION'S REACH SHOULD BE MODIFIED 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page

Aiken v. City of Memphis, 37 F.3d 1155 (6th Cir. 1994) 9

Bratton v. City of Detroit, 704 F.2d 878, *modified* 712 F.2d 222 (6th Cir. 1983), *cert. den.* 464 U.S. 1040 (1984) 7

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) . . . . . *passim*

Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994), *reh. den., cert. den.*, U.S. ; 115 S. Ct. 1315 (1995) 6

DPOA v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. den.* 452 U.S. 938 (1981) 7

DPOA v. Young, 989 F.2d 225 (6th Cir. 1993), *on remand* 850 F. Supp. 27 (E.D. Mich. 1994) 8

Jansen v. City of Cincinnati; 977 F.2d 238, 243, (6th Cir. 1992) 8

Johnson v. Mortham, 915 F. Supp. 1574 (N.D. Fla. 1996) . 3

Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987) 4

Harper v. Virginia Dpt. Of Taxation, 113 S. Ct. 2510 (1993) 10

Michigan Road Builders Ass'n,, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1987) 8

Owen v. City of Independence, Mo., 445 U.S. 622 (1980). . 7

Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994) 6

Reynoldsville Casket Co. v. Hyde, 115 S. Ct. 1745 (1995) 7

United States v. Paradise, 480 U.S. 149 (1987) 2, 8

United Steelworkers v. Weber, 443 U.S. 193 (1979) 3

Wygant v. Jackson Bd of Educ., 476 U.S. 267, *reh. den.* 488 U.S. 1014 (1986) 3, 8

INTRODUCTION

In accordance with Supreme Court Rule 15.6, Petitioner the City of Flint ("City") respectfully submits this Reply Brief to address certain assertions in Respondents' Brief in Opposition. The City also requests that the Court disregard any factual assertions made by Respondents which are not supported by the record.

FACTUAL BACKGROUND

Respondents open with the assertion that the City rejected the use of less intrusive affirmative action measures in favor of a "quick fix quota." Resp. Brief, p. 1. This assertion is both inaccurate and misleading. Less intrusive measures had been undertaken under the pressure of litigation during the mid-1970's, including a 1:4 promotional remedy; however, after about ten years, those measures had failed to eradicate the effects of the undisputed prior racial discrimination in the Flint Police Department. Chief White's testimony before the Human Relations Commission (HRC) is simply undisputed that between 1977 and 1982 none of the fifteen promotions to sergeant were minorities and, if no remedial action was taken in 1984, the next twenty-one promotions to sergeant from the existing list would all have been white officers. See Petition, pp. 3-4 and App. 85a.

Respondents argue that the factual predicate for the City's motion for summary judgment "was a proposed stipulation of facts submitted to the court by the City's counsel." Resp. Brief, p. 1. The record is clear that there was no stipulation of facts. Rather, unable to secure a stipulation, counsel for the City submitted a list of events and documents upon which the City would rely. R. App. 5a-11a. Identification of events and documents on which the City would rely for purposes of the motion for summary judgment is a far cry from a stipulation as to the relevant underlying facts. Further, this case is not one where summary judgment was reversed based on the testimony or analysis of the competing expert, but one where the Sixth Circuit raised new objections and challenges to the City's evidence.

Respondents assert that the 1:1 Plan was "the product of racial politics." Resp. Brief, p. 5. However, in contrast with the majority-black city council in *Croson*, the Flint City Council which adopted the Plan was not controlled by a black majority and did not act merely upon a history of "societal discrimination." *City of Richmond v. Croson*, 488 U.S. 469 (1989). Rather, the Flint City Council acted only after making specific findings that the effects of past racial discrimination by the Police Department itself continued to exist. In fact, the City Council did not adopt the more accelerated 65/35 ratio which had been recommended by the City's EEO officer. App. 94a and 98a. Evidence that the newly-elected black mayor felt strongly that the effects of past discrimination should be rectified does not mean affirmative action was not warranted, nor does it negate the evidence that there were lingering effects of prior discrimination in the Department.

ARGUMENT

I. THE SIXTH CIRCUIT'S APPLICATION OF THE STRICT SCRUTINY STANDARD WAS FATAL IN FACT.

Respondents answer on a "point-by-point" basis and, in doing so, avoid addressing the inescapable conclusion that the Sixth Circuit's review was conducted with fatally strict scrutiny. Not only is this "fatal-in-fact" scrutiny demonstrated by the examples discussed in the Petition, pp. 7-11, but also by the improper shifting of the burden of proof to the City, Petition, pp. 11-13, and by the Sixth Circuit's departure from this Court's precedent in rejecting the City's statistical evidence, Petition, pp. 13-18.

While Respondents attempt to minimize the importance of the Sixth Circuit's direct factual comparison between this case and the facts in *Paradise*, the significance of the Sixth Circuit's analysis and conclusions is inescapable. Petition, pp. 8-9. *United States v. Paradise*, 480 U.S. 149 (1987). Moreover, while Respondents state that *Paradise* was the only Supreme Court decision where a quota of this magnitude was upheld, the Respondents overlook this Court's decision in

United Steelworkers v. Weber, 443 U.S. 193 (1979), which upheld a collectively-bargained 1:1 quota.

Respondents attempt to side-step the Sixth Circuit's handling of the prior judicial decisions involving discrimination in the Flint Police Department by arguing that the Sixth Circuit did not expressly hold that prior judicial findings of discrimination were required. However, there can be no doubt that the Sixth Circuit relied on evidence that a 1:1 promotional remedy was not ordered in 1977 to conclude that such a remedy could not be justified in 1984 as a matter of law.

Finally, Respondents concede that the Sixth Circuit concluded that the impact of the promotional remedy on non-minorities was severe as a matter of law. The Sixth Circuit's resolution of this issue is inconsistent with this Court's holdings. Petition, pp. 10-11. Respondents suggest that it was proper because that finding was based on undisputed facts. Yet the Sixth Circuit reached its conclusion without regard to the undisputed evidence in the record that, as part of the Plan, the City increased the number of sergeant positions and significantly increased the compensation to police officers. App. 231a. The error is poignantly highlighted by the fact that the Sixth Circuit specifically remanded for a determination of "whether any of the plaintiffs were actually injured by the application of the plan". App. 38a.

II. THE SIXTH CIRCUIT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY TO PROVE THAT ITS AFFIRMATIVE ACTION PLAN WAS CONSTITUTIONAL.

Respondents misapprehend both the issues and the law, suggesting that they are relieved of any burden of proof when the Plan is examined under strict scrutiny. The Sixth Circuit's placement of the burden of proof is contrary to this Court's precedent and conflicts with the decisions of other circuits. Petition, pp. 11-13. Respondents do not address this Court's pronouncements in *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 277-278 (1986), regarding the proper burden of proof but, instead, rely on a district court opinion in a case involving a

voter's equal protection challenge to a redistricting plan. *Johnson v. Mortham*, 915 F. Supp. 1574 (N.D. Fla. 1996). Respondents' attempt to distinguish the decisions of the other circuits is also futile. Resp. Brief, n. 10. See Petition, p. 12, n. 5.

Respondents also assert that the City's suggested analysis is incorrect because it is used in Title VII litigation, not Fourteenth Amendment litigation. However, not only do the cases relied upon by the City involve equal protection challenges to affirmative action, Petition, pp. 11-13, but Justice O'Connor has expressed the view that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause." *Johnson v. Santa Clara County*, 480 U.S. 616, 649 (1987). The City produced evidence of a gross statistical disparity (as well as strong anecdotal evidence), which, consistent with *Croson*, satisfied the City's burden of producing evidence to support an inference of discrimination.

Finally, Respondents state that they "produced evidence and raised arguments to overcome the justification advanced by the City". Resp. Brief, p. 12. To the contrary, it was not Respondents' evidence or arguments that the Sixth Circuit relied upon in invalidating the Plan *ab initio*, but its own challenges to the City's evidence made without any evidentiary support in the record. Nor does the Sixth Circuit's rejection of the evidence have a basis in appropriate statistical analysis. In the opinion of a leading statistical expert, David Peterson, Ph.D., the City's expert, Dr. Bendick, not only asked the appropriate question for this inquiry, but also concluded that his methods were reasonable and "reflect the thought and craftmanship one would expect of a good economic analyst." Reply App. 7a.

The Sixth Circuit improperly shifted the burden to the City to prove the Plan was constitutional and, having raised its own challenges to the City's evidence, declared the Plan unconstitutional *ab initio* as a matter of law.

III. THE SIXTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT IN REJECTING THE CITY'S STATISTICAL EVIDENCE.

Unable to defend the Sixth Circuit's departure from the holding in *Paradise* (that the pool of previously-hired officers was not the relevant statistical pool because discrimination at the entry level precluded blacks from competing for promotion), Respondents suggest that the City is misstating the Sixth Circuit's holding. App. 25a. However, it is Respondents who miss the point. The crux of the issue is not whether sergeants had actually been hired from any other pool than previously-hired officers, but whether the pool of previously-hired police officers was affected by discrimination in hiring. Respondents' expert, Harry Frank, Ph.D., admitted that he simply did not consider this question, App. 214a, as Dr. Peterson aptly noted, Reply App. 3a.

The City's expert, Marc Bendick, Ph.D., examined the pool of persons qualified to be an entry-level police officer, a position which does not require any "special skills", to determine how many police officers would have been minority absent discrimination in hiring. In contrast to *Croson*, the qualified labor pool identified in this case was the proper relevant statistical pool for entry-level police officers.[1] This conclusion is confirmed by Dr. Peterson, Reply App. 1a-7a, who supports the methodology of Dr. Bendick and addresses some of the Sixth Circuit's unwarranted criticisms based upon unsound assertions.

Respondents try to narrowly read the Sixth Circuit's decision departing from *Croson*. However, the Sixth Circuit broadly and expressly concluded that an affirmative action plan is "constitutionally unsupportable" when it is derived from general proportions, "even with whatever 'adjustments' the

---

[1] Concerns about assumptions and factors which the Sixth Circuit suggested might affect the validity of the analysis, were not raised by Respondents or Respondents' expert, and the record was devoid of evidence from which one could determine whether the assumptions were valid or whether consideration of such factors would actually affect the analysis.

experts, litigants, or courts may think appropriate." App. 25a.[2] This holding is a clear departure from this Court's teachings that a gross statistical disparity can make a *prima facie* case of discrimination and establish a strong basis in evidence to support affirmative action.

IV. THE SIXTH CIRCUIT FAILED TO CONFINE ITS REVIEW TO WHETHER THE RESPONDENTS HAD RAISED A GENUINE ISSUE OF MATERIAL FACT WHICH REQUIRED THAT THE CITY'S MOTION BE DENIED.

To deny the existence of fact issues, Respondents rely heavily upon their assertion that there was a stipulation regarding the facts. As discussed above, the lists of events and documents upon which the City relied for purposes of the motion did not include or constitute a stipulation as to the relevant facts.

More importantly, regardless of whether there was a stipulation, Respondents do not dispute that the Sixth Circuit's challenges to the accuracy and validity of the City's statistical evidence were unsubstantiated by any evidence in the record. In the absence of such evidence, the Sixth Circuit's reversal of summary judgment was a clear departure from the proper standard of review. *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994).

At best, the Sixth Circuit's attempt at impeachment of the statistical evidence raised factual questions about which there was simply no evidence in the record. If these challenges had been raised at the summary judgment stage, the City would have taken the opportunity to address them and offer additional evidence; such as the opinion of Dr. Peterson, to support the City's statistical evidence. Reply App. 1a-7a. At most, the Sixth Circuit's challenges should have resulted in remand for further proceedings, not resolution as a matter of law. *Concrete Works of Colorado v. City and County of*

---

[2]The Sixth Circuit also overgeneralizes from its observations that persons whose origin was the Indian continent are over represented among hotel owners. App. 24a-25a.

Denver, 36 F.3d 1513 (10th Cir 1994), *reh. den., cert. den.*, 115 S.Ct. 1315 (1995).[3]

V. THE SIXTH CIRCUIT UNJUSTLY APPLIED AN IMPROPERLY HEIGHTENED SCRUTINY RETROACTIVELY TO AN AFFIRMATIVE ACTION PROGRAM ADOPTED IN CONFORMITY WITH EXISTING PRECEDENT.

Respondents do not dispute that, at its adoption, the Plan conformed with existing Sixth Circuit precedent. They concede, as they must, that the Plan mirrored the affirmative action plans for the police department of the City of Detroit, repeatedly approved in Sixth Circuit decisions. *Bratton v. City of Detroit*, 704 F.2d 878, *modified*, 712 F.2d 222 (6th Cir. 1983), *cert. den.*, 464 U.S. 1040 (1984), *DPOA v. Young*, 608 F.2d 671 (6th Cir. 1979), *cert. den.* 452 U.S. 938 (1981).

Instead, Respondents first confuse and misstate the City's contention that it was inequitable and unjust for the Sixth Circuit to apply the 1989 *Croson* standard retroactively to City conduct in 1984 in conformity with then Sixth Circuit precedent to avoid an affirmative action plan *ab initio*. Respondents state that the City asserts a defense of "good faith immunity" in order to contend waiver for failure to plead such immunity as an affirmative defense or as an issue in dispositive motions. However, as the majority and concurring opinions in *Reynoldsville Casket Co. v. Hyde*, 115 S. Ct. 1745, 1751 and 1753 (1995) recognized, good faith immunity is not the only instance where reliance may justify a decision not to apply the *Croson* standard retroactively. Moreover, the good faith advanced by the City to oppose retrospective relief is not the good faith immunity of public officials who act in reliance on clearly established law, since there is no individual defendant, *Owen v. City of Independence, Mo.*, 445 U.S. 622

---

[3] Respondents do not attempt to defend the Sixth Circuit's reliance on 1992 statistics to undermine the basis for the City's adoption of the Plan in 1984. Petition, pp. 19-20. Nor do Respondents attempt to explain the Sixth Circuit's fundamental inconsistencies between its conclusion that "deeper analysis" of the statistical evidence was necessary and its conclusion that the City did not have a compelling state interest as a matter of law. App. 22a and 28a.

(1980). Rather, the City argues that its reliance on existing precedent approving the very same plan and on the approval of its plan by the state civil rights department (an approval permitted but not required under the state statute) should militate against a finding of unconstitutionality *ab initio*.

More troubling is Respondents' cavalier belief that the City should have been able to predict that this Court would adopt the strict scrutiny standard in 1989, even though as of 1984 the Sixth Circuit had adopted the "reasonableness" standard championed by Justice Marshall and other Justices of this Court. Even after its plurality decision in *Wygant*, which Respondents claim reversed the reasonableness standard previously followed in the Sixth Circuit, this Court noted that it had "yet to reach consensus on the appropriate constitutional analysis." *Paradise*, 107 S. Ct. at 1064. Not until *Croson*, a case clearly distinguishable on its facts in light of Richmond's reliance on mere assertions of past discrimination and its failure to analyze the relevant qualified applicant pool, did this Court field a majority for an appropriate standard for benign classification cases in the minority set-aside context.

Next, Respondents suggest that the City should have realized from a minority set aside case in the Sixth Circuit in 1987 that the strict scrutiny standard would be applicable. Respondents now assert, to avoid certiorari, that there were no promotions before 1987. However, that claim differs from the claims of earlier failures to promote made by Respondents below. Initially, the City reiterates that it won summary judgment under the *Croson* standard, and that the Sixth Circuit impermissibly heightened the *Croson* standard to invalidate the Plan *ab initio*. Furthermore, the case upon which Respondents rely, *Michigan Road Builders Ass'n., Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), an inapposite minority set aside case, was not decided until November 25, 1987, with rehearing denied February 23, 1988; its certiorari petition was apparently held pending the outcome in *Croson* in 1989. *See*, 489 U.S. 1061 (1989). In a vigorous dissent in *Michigan Road Builders*, then Chief Judge Lively criticized the majority opinion for its inappropriate scrutiny of the findings made by the State of Michigan in adopting its set aside program. Respondents also fail to mention that, in late 1986, the Sixth Circuit continued

to cite with approval and to rely upon *Weber* in promotion cases, *see, e.g., Youngblood v. Dalzell,* 804 F.2d 360 (6th Cir. 1986), and throughout 1985-1991 approved *sub silentio* the use of dual lists in an affirmative action plan. *Jansen v. City of Cincinnati,* 977 F.2d 238, 243 (6th Cir. 1992). The Sixth Circuit also noted that in *Wygant* and *Johnson* the burden of proving that their constitutional rights had been violated fell on non-minority challengers to an affirmative action plan. *Id.* Moreover, following *Michigan Road Builders,* minority set aside cases were distinguished when voluntary or consent decree affirmative action programs were evaluated. *Aiken v. City of Memphis,* 37 F.3d 1155, 1172-1175 (6th Cir. 1994) (dissenting opinion). Even in the *Arrow Office Supply* case cited by Respondents, the district court remarked that this Court considered, as late as *Croson* that a more relaxed type of scrutiny might be appropriate "when 'the white majority' places a burden on itself"; however, that standard could not be hypothesized where the majority of Richmond's City Council members were African-American. Respondents blatantly assert that "racial politics" like those at play in *Croson* compelled adoption of the Plan, but never deny that the Flint City Council was controlled by a Caucasian majority; moreover, the thin evidence they cite of the Mayor's support of affirmative action does not demonstrate that he or African-Americans controlled the adoption of the Plan. Clearly, even under Sixth Circuit precedent in the late 1980's and early 1990's, a different standard of scrutiny was applied to voluntary affirmative action programs than the strict scrutiny applied by the Sixth Circuit here.

Finally, Respondents contend that this Court should not consider whether retrospective relief is appropriate where a new rule of law was not fashioned in this case. The City reiterates that the Sixth Circuit's use of an improperly heightened standard of scrutiny (particularly where it applied 1992 statistics to the 1984 Plan) and its failure to simply terminate the Plan, as it did the City of Detroit's affirmative action plan in 1993, constituted a new rule of law as to voluntarily adopted affirmative action plans. *DPOA v. Young,* 989 F.2d 225 (6th Cir. 1993), *on rem.* 850 F. Supp. 27 (E.D. Mich. 1994). Where an appellate court has applied a standard different from the standard in place when the government

actors acted in adopting an affirmative action plan, then relief, if any, should run only from the date of the new standard, and not from the date of the adoption of the Plan. To rule otherwise submits the City of liability for conduct legal at the time the Plan was adopted and to millions of dollars in exposure for the entire period of time in which the Plan operated. Respondents assert that such exposure is limited where the Plan ended in "1993," but fail to remark that promotions before 1987 are in issue and that the Sixth Circuit remanded for proofs on whether a *de facto* Plan continued after 1992. This case thus demonstrates the very concern posed by those justices uncomfortable with the *Harper* rule, *Harper v. Virginia Dpt. Of Taxation,* 113 S.Ct. 2510 (1993), and presents an appropriate vehicle for its revisiting the *Harper* rule.

CONCLUSION

For all of the above reasons, this Court should grant this Petition for Certiorari, and/or vacate the decision of the Sixth Circuit, and either (a) reinstate the District Court's decision, or (b) remand to the District Court for reconsideration on a re-opened record of whether, under the changed legal standard, Respondents can prove the Plan unconstitutional and/or at what point in time any retroactive remedy should arise.

Respectfully submitted,

KELLER, THOMA,
SCHWARZE, SCHWARZE
DuBAY & KATZ, P.C.
By: Terrence J. Miglio*
**Counsel of Record*
Patricia B. Kenny
Karin M. Young
Attorneys for Petitioner
440 E. Congress, 5th Fl.
Detroit, MI 48226
(313) 965-7610

VERCRUYSSE METZ &
MURRAY
By: Diane M. Soubly
Co-Counsel for Petitioner
Ste. 200, 31780 Telegraph Rd.
Bingham Farms, MI 48025
(810) 850-8019

Date: April 16, 1997

AFFIDAVIT OF DAVID W. PETERSON

DAVID W. PETERSON, being duly sworn, deposes and says:

1. I am president of PRI Associates, Incorporated, a company whose chief activity is providing statistical litigation support. I am also recently retired as Adjunct Professor in the Institute of Statistics and Decision Sciences at Duke University, Durham, North Carolina, where for more than twenty years I taught courses in the theory and application of statistics. I am co-author of a book entitled *Use of Statistics in Equal Employment Opportunity Litigation*, the guest editor of a special issue of the journal *Law and Contemporary Problems* devoted to statistical inference in litigation, and the contributor of a chapter to each of two other books on the use of statistics in litigation. I have testified in federal district courts around the nation as an expert statistical witness in more than thirty cases and worked with legal teams as a statistical expert in more than two hundred different cases. I have testified for and advised plaintiffs as well as defendants.

2. My firm is retained in this case to comment on the statistical work done by Dr. Marc Bendick and Dr. Harry Frank, experts at trial for the defendant and the plaintiffs, respectively, and further to comment on the Sixth Circuit Court of Appeals' interpretation of their work.

3. As a result of my review of the work of Drs. Bendick and Frank, and of the Sixth Circuit's opinion, I conclude

a. That Dr. Bendick demonstrated convincingly that, as of 1984 and for some years thereafter, minorities held a smaller number of positions at each police rank than they probably would have held had the City never at any time discriminated in any way in its employment practices; and

b. That the City's 1:1 promotion of minorities to sergeant achieved appropriate minority representation in the rank of sergeant.

4. The materials on which I rely for these conclusions are

a. Dr. Bendick's April 1984 Report entitled "Minority Hiring and Promotion in the Flint Police Department: A Labor Market Analysis";

b. Dr. Bendick's February 1992 Report entitled "The Representation of Minorities at the Rank of Sergeant in the Flint Police Department: An Updated Labor Market Analysis";

c. Dr. Frank's undated but post-1989 Report entitled "Comparison of the Proportions of Black Sergeants and Black Patrol Officers 1980-1989"; and

d. The Sixth Circuit Court of Appeals' opinion in this case, 92 F.3d 396 (6th Cir. 1996).

5. The basis for my opinions is set forth below, following a summary of the works by Drs. Bendick and Frank.

A Synopsis of Dr. Bendick's Work

6. The question Dr. Bendick addresses with his analysis is

> In the absence of discriminatory personnel practices of any kind on the part of the City of Flint, what would the racial composition of the City's various police ranks have been?

He addresses this question as of two different dates: 1984 and the beginning of 1992. Having settled on his answer to the above question, Dr. Bendick then examines the actual racial composition of the City's police officers, and concludes that

a. In 1984, there were fewer minority incumbents in each of the four major-rank groups of police officers than there would have been in the absence of past discriminatory personnel practices; and

b. In 1992, there were fewer minority incumbents in the first two major rank groups of police officers than there would have been in the absence of past discriminatory personnel practices.

A Synopsis of Dr. Frank's Work

6. Dr. Frank, in contrast, compares the racial composition of incumbent sergeants to that of incumbent police officers each year from 1980 through 1989 and finds, at least in the mid-to-late 1980s, that the two compositions are quite similar. Indeed, he notes that the proportion of sergeants who are minority group members exceeds that of police officers in the late 1980s.

Discussion

What is the Question?

7. The initial issue in examining the works of both Dr. Bendick and Dr. Frank is whether either one of them addressed their studies to a question of interest in this litigation. In my view, Dr. Bendick did and Dr. Frank did not.

8. The main question addressed by Dr. Bendick in 1984 was whether, in the absence of any racially discriminatory practices by the City of Flint, either in recruiting, testing, hiring, retaining, promoting or any other aspect of employee management, there would have been more minority police officers incumbent in each of the four major rank groups than in fact were incumbent in 1984. If the answer to this question is affirmative, it is an indication that one or more aspects of the City's personnel practices may have operated to the disadvantage of minorities in achieving jobs at these ranks.

9. Dr. Frank, on the other hand, by comparing the composition of police sergeants to that of the officers in the rank below, examines only the question of whether the promotion of minorities to sergeant is keeping pace with their representation among entry level police officers. It does not address the issue of whether the number of minority police

officers is appropriate, and it likewise avoids the issue of whether, had the City never discriminated, there would have been more minority sergeants.

10. The question before the court is whether the City's practice of promoting minority police officers to sergeant in one-to-one proportion with non-minority promotions from 1984 on is justifiable. Whether it is, as I understand the situation, depends at least in part on whether the City's employment practices have artificially depressed the number of minority police sergeants.

Did Dr. Bendick Answer His Question?

11. Determining the proper racial composition of the City's police sergeants in 1984, involves two steps: first, the estimation of the racial composition of the segment of the labor market from which police officers are or should be hired by the City, and second, an estimation of the number of minority sergeants that would be incumbent had they been racially representative of the labor market from which they were originally hired as police officers.

12. The first of these steps necessarily involves estimation and approximation, because there is no practical way to determine precisely who is interested in and qualified for police officer jobs with the City at each moment in time. The main resource available for this task is data from the various decennial censuses collected by the US Bureau of Census, the source used by Dr. Bendick. These detailed data are published by the Bureau in various summary forms, none of which pertain specifically and exclusively to the pool of people from which the City of Flint might reasonably be expected to draw its police officers on a particular date. Hence, in estimating the racial composition of this pool of people, one must start with a pool that is approximately correct, and then make various adjustments to improve that approximation.

13. Dr. Bendick followed this method by starting with the entire population in the vicinity of the City, and casting out people who were either too old or else too young to qualify as

police officers, those who had either too little or too much education, and those who were not part of the civilian labor force. He also added in a few people to account for the fact that the US census usually undercounts people, especially minorities, and made a further adjustment to account for the tendency of minorities more than non-minorities to seek public sector jobs. The resulting pool of people is, quite plausibly, the pool from which the City might reasonably have been expected to draw its police officers.

14. Of course, the above assertion holds true only for times proximate to the time the census data were collected, *i.e.*, each of the years 1950, 1960, 1970 and 1980. The composition of the residents of Flint changed dramatically during this time from about 10% minority in 1950 to about 45% in 1980. As a result of this change and of the fact that some of the City's police officers as of 1984 had been hired as far back as the late 1950s, a separate labor market composition estimate is needed for each of these census years. To track changes in the labor market composition through intervening and subsequent years, the composition estimates for each of the years 1950, 1960, 1970 and 1980 need to be interpolated or extrapolated. All of this, Dr. Bendick did.[1]

15. The second step in estimating the perfect parity composition of the City's sergeants in 1984 is to group them by their year of hire, and then determine exactly how many in

---

[1] In checking through Dr. Bendick's calculations, especially in light of the Circuit Court's remark at 399 that "Dr. Bendick's [1970] statistics differed sharply from those of other statisticians", I found that Dr. Bendick's 1970 minority availability estimate should have been about 30% rather than about 45%. When I use 30% for the 1970 availability percentage but otherwise repeat Dr. Bendick's calculations, I find that the perfect parity number of officers is 75.3 rather than Dr. Bendick's 91: hence, both of our figures are well in excess of the actual number (45) of minority officers. I find that the perfect parity number of sergeants in 1984 was 17.4 rather than Dr. Bendick's 27: hence, once again both of these figures are well in excess of the actual number (8). Thus, while Dr. Bendick may have erred in calculating the 1970 labor market composition, that error would not have affected his conclusions about the under representation of minorities on the police force in 1984.

each group would have been minorities had each year's group been hired in perfect racial parity with the labor market that year. This calculation too, Dr. Bendick did.

16. In sum, I believe that Dr. Bendick's estimate of the proper racial composition of City's police force is the product of careful thought and reasonable approximation. The assertion by the circuit court at 403 that Dr. Bendick has compared the "composition of the [C]ity's police sergeants to the general Flint labor force" is clearly wrong.[2] His comparison is much more refined than that.[3]

17. In an aside, the Sixth Circuit complains (note 8) that "Dr. Bendick's numbers are quite misleading in other ways," pointing out in effect that the racial composition of the officers active in 1992 who were hired in the mid-1970s does not reflect the racial composition of the totality of people hired as police officers in the mid-1970s. While the Sixth Circuit may be numerically correct in its observation, I think it is wholly off-point. I did not detect any intent on the part of Dr. Bendick to either rely upon or hide this point. The racial composition of the totality of people hired as police officers in the mid-1970s has no role in the perfect parity calculation; what is important to the calculation is the number of people hired then who were still active in 1992, and the racial composition of the pool from which they were selected for hire.

---

[2] The Sixth Circuit repeats this assertion at 406, saying that the City's expert was "basing his numbers primarily on the percentage of minority members in the general workforce of Flint." This is not true, and the court seems to acknowledge as much in its note 7.

[3] As it happens, once Dr. Bendick's various adjustments have been made, the resulting labor market minority percentage is in every case similar to the representation of minorities in the population as a whole. Nationally in 1980, blacks constituted 11.8% of the US population and 15.4% of the police and detectives, suggesting (i) that blacks to a greater extent than non-blacks seek jobs as police and detectives and therefore that (ii) Dr. Bendick's minority percentage estimates may be a little low. (See Statistical Abstract of the United States, 1986, Tables 27 and 680.)

18. At 407, the Sixth Circuit asserts that Dr. Bendick "assumes without any substantiation whatsoever that minority men and women as a group are exactly as inclined as are non-minority men and women as a group — neither more so nor less so — to seek employment in the police department, and that they are exactly as qualified under non-discriminatory conditions." This is not quite true. That assumption comes only after Dr. Bendick has trimmed the labor market down to people with the age and educational levels likely to make them good candidates for police work. Once again the Sixth Circuit appears to be under the misapprehension that Dr. Bendick's comparisons rely on gross population statistics; that simply is not so.

19. In sum, it is my opinion that the question asked and answered by Dr. Bendick is more relevant to the appropriateness of the City's promotion policy than is the question asked and answered by Dr. Frank. Furthermore, the methods used by Dr. Bendick to obtain his answers are reasonable, and they reflect the thought and craftsmanship one would expect of a good economic analyst.

Further the Affiant saith naught.

By /s/ David W. Peterson
David W. Peterson

NORTH CAROLINA
ORANGE COUNTY

I, Peter R. Skalak, a Notary Public of said County and State do hereby certify that David W. Peterson personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and notarial seal, this the 15th day of April, 1997.

By /s/ Peter R. Skalak
Notary Public
My Commission Expires:
January 16, 2002